

United States
Circuit Court of Appeals
For the Ninth Circuit.

KEANE WONDER MINING COMPANY, a Cor-
poration,
Plaintiff in Error,
vs.
JAMES CUNNINGHAM,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Nevada.

Filed

JAN 25 1915

F. D. Monckton,
Clerk.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the Seventh Judicial District
of the State of Nevada, in and for the County of
Esmeralda.*

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant.

Complaint.

Plaintiff complains of defendant, and for cause of action alleged:

I. That defendant is and at all times hereinafter mentioned was a corporation duly organized, existing and doing business in Nevada, California, and elsewhere under and by virtue of the laws of the State of Arizona, and engaged in mining a group of mining claims in Inyo County, California.

II. That on, to wit, the 9th day of December, 1911, defendant was engaged in driving a stope upwards from a tunnel situate in said premises, and plaintiff was at said time the servant of defendant, engaged as a mucker in removing the loose rock and earth broken down from the roof and walls of said stope in the course of the excavation thereof, and was compelled by his said employment to be in said tunnel and under said stope.

III. That defendant had at said time in charge of said work a superintendent upon whom defendant placed the duty of keeping the place where de-

fendant's servants were employed in a safe condition; that reasonable care for the safety of defendant's servants compelled by their employment to be in said tunnel and under said stope required that the roof and walls, and especially the roof of said stope, should be supported by timbers or otherwise to prevent the falling of rock and earth which should become detached therefrom by reason of their own weight or overburden or the operation of the law of gravity or other natural causes, but defendant negligently failed to have timbers so installed or otherwise to support said roof and walls, and the same were without any support whatsoever.

IV. That at said time there was and still is in force and effect in the State of California an Act of the Legislature of said State entitled, "An Act relating to the liability of employers for injuries or death [1*] sustained by their employees, providing for compensation for the accidental injury of employees, establishing an industrial accident board, making an appropriation therefor, defining its powers and providing for a review of its awards," approved March 8, 1911, which said Act provided and provides, among other things, that in any action to recover damages for a personal injury sustained within the State of California by an employee while engaged in line of his duty or the course of his employment as such, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, the fact that such employee may have been guilty of con-

*Page-number appearing at foot of page of original certified Record.

tributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross, in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee, and it shall not be a defense, (1) that the employee either expressly and impliedly assumed the risk of the hazard complained of; (2) that the injury or death was caused in whole or in part by the want of ordinary or reasonable care of a fellow-servant. That said act further provided and provides that the liability of employers who shall not have declared their election to be bound by the provisions of said act shall be the same as if said act had not been passed, but shall be subject to the hereinabove quoted provisions of the act. The defendant had not at said time and has never since said time elected to be bound by the provisions of said act.

V. That the duty of keeping said premises in a safe condition was not placed by defendant upon plaintiff, and plaintiff was not aware that rock and earth were liable to fall from the walls and roof of said stope, and that the place wherein he was so employed was unsafe because of defendant's failure to keep said stope properly timbered or otherwise supported.

VI. That while plaintiff was performing his work as such mucker and while necessarily in said tunnel and under said stope, and without any negligence on his part, a large body of rock and earth, by reason of their [2] own weight and overburden and the operation of the law of gravity or other natural

cause, and because the walls and roof of said stope were not properly timbered or otherwise supported, fell from said walls and roof upon plaintiff, fracturing and splintering the bone of his left leg.

VII. That no medical assistance was to be had at said mine or nearer thereto than the town of Goldfield, Esmeralda County, Nevada, and plaintiff was compelled to have himself transported from said mine to Goldfield, a distance of about one hundred (100) miles, in an automobile, over rough roads, causing him intense physical pain; that in order to bring the parts of said broken limb together he was compelled to have about two (2) inches of said bone removed, and he is and will be thereby crippled and incapacitated from efficient work for life; and that he has been since December 10, 1911, and still is confined in a hospital at Goldfield, and has suffered and still suffers great physical pain, and will for the rest of his life be subjected to great inconvenience and humiliation by reason of the shortening of said limb, all to his damage in the sum of twenty-five thousand dollars (\$25,000.00), and his costs in this action.

AUGUSTUS TILDEN,

Attorney for Plaintiff.

State of Nevada,

County of Esmeralda,—ss.

James Cunningham, being first duly sworn, deposes and says: That he is the plaintiff above-named; that he has read the above and foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge.

JAMES CUNNINGHAM.

Subscribed and sworn to before me this 15 day of June, A. D. 1912.

My commission expires January 17th, 1914.

[Seal] CARROLL HENDERSON,
Notary Public, in and for the County of Esmeralda,
State of Nevada.

[Endorsed]: 3557. Box 385. In the District Court of the Seventh Judicial District of the State of Nevada, in and for the County of Esmeralda. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, a Corporation, Defendant. Complaint. Filed July 6th, 1912. Joseph Hamilton, [3] Clerk. By C. T. Golden, Deputy. Due service of the within — this — day of —, 191—. —, Attorneys for —. Augustus Tilden, Attorney for Plaintiff. Goldfield, Nevada.

No. 1576. U. S. Dist. Court, Dist. Nevada. Filed September 18, 1912. T. J. Edwards, Clerk.

[Order of Removal.]

*In the District Court of the Seventh Judicial District
of the State of Nevada, in and for the County of
Esmeralda.*

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Corporation,

Defendant.

This cause coming on for hearing upon the application of the defendant herein for an order transferring this cause to the United States District Court for the District of Nevada, and it appearing to the Court that the defendant has filed his petition for such removal in due form of law and given the requisite notice therefor, and that the defendant has filed his bond duly conditioned with good and sufficient securities as provided by law, and it appearing to the Court that this is a proper cause for removal to said District Court,

Now, therefore, it is hereby ordered and adjudged that this cause be and is hereby removed to the United States District Court for the District of Nevada, and the clerk is hereby directed to make up the record in said cause for transmission to said court forthwith.

Done in open court this 21st day of August, 1912.

PETER J. SOMERS,

Judge of the Above-entitled District Court.

[Endorsed]: 3557. Box 385. In the District Court of the Seventh Judicial District of the State of Nevada, in and for the County of Esmeralda. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, a Corporation, Defendant. Order. Filed Aug. 21, 1912. Joseph Hamilton, Clerk. By Benj. Rosenthal, Deputy.

No. 1576. U. S. Dist. Court, Dist. Nevada. Filed September 18, 1912. T. J. Edwards, Clerk. [4]

*In the District Court of the Seventh Judicial District
of the State of Nevada, in and for the County of
Esmeralda.*

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant.

Demurrer.

Comes now the defendant above named, and without submitting itself to the jurisdiction of the above-entitled court, demurs to the complaint of plaintiff on file herein, and upon the following grounds, to wit:

1. That it appears upon the face of the complaint that the Court has no jurisdiction of the person of the defendant.

2. That it appears upon the face of the complaint that the Court has no jurisdiction of the subject of the action.

Wherefore, plaintiff prays judgment on demurrer that said action be dismissed, and that defendant recover its costs of suit incurred herein.

B. M. AIKINS,

Attorney for Defendant.

[Endorsed]: No.3557. Box 385. In the District Court of the Seventh Judicial District of the State of Nevada, in and for the County of Esmeralda. James Cunningham, Plaintiff, vs. Keane Wonder

This cause coming on for hearing upon the application of the defendant herein for an order transferring this cause to the United States District Court for the District of Nevada, and it appearing to the Court that the defendant has filed his petition for such removal in due form of law and given the requisite notice therefor, and that the defendant has filed his bond duly conditioned with good and sufficient securities as provided by law, and it appearing to the Court that this is a proper cause for removal to said District Court,

Now, therefore, it is hereby ordered and adjudged that this cause be and is hereby removed to the United States District Court for the District of Nevada, and the clerk is hereby directed to make up the record in said cause for transmission to said court forthwith.

Done in open court this 21st day of August, 1912.

PETER J. SOMERS,

Judge of the Above-entitled District Court.

[Endorsed]: 3557. Box 385. In the District Court of the Seventh Judicial District of the State of Nevada, in and for the County of Esmeralda. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, a Corporation, Defendant. Order. Filed Aug. 21, 1912. Joseph Hamilton, Clerk. By Benj. Rosenthal, Deputy.

No. 1576. U. S. Dist. Court, Dist. Nevada. Filed September 18, 1912. T. J. Edwards, Clerk. [4]

*In the District Court of the Seventh Judicial District
of the State of Nevada, in and for the County of
Esmeralda.*

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant.

Demurrer.

Comes now the defendant above named, and without submitting itself to the jurisdiction of the above-entitled court, demurs to the complaint of plaintiff on file herein, and upon the following grounds, to wit:

1. That it appears upon the face of the complaint that the Court has no jurisdiction of the person of the defendant.

2. That it appears upon the face of the complaint that the Court has no jurisdiction of the subject of the action.

Wherefore, plaintiff prays judgment on demurrer that said action be dismissed, and that defendant recover its costs of suit incurred herein.

B. M. AIKINS,

Attorney for Defendant.

[Endorsed]: No.3557. Box 385. In the District Court of the Seventh Judicial District of the State of Nevada, in and for the County of Esmeralda. James Cunningham, Plaintiff, vs. Keane Wonder

Mining Company, a Corporation, Defendant. Demurrer. Dated August —, 1912. Service admitted Aug. 20, 1912. Aug. Tilden, Atty. for Plff. Filed August 21, 1912. Joseph Hamilton, Clerk. By Benj. Rosenthal, Deputy.

No. 1576. U. S. Dist. Court, Dist. Nevada. Filed September 18, 1912. T. J. Edwards, Clerk.

[Order Sustaining Demurrer, etc.]

No. 1576.

“JAMES CUNNINGHAM

vs.

KEANE WONDER MINING CO.

ORDER OF COURT SUSTAINING THE DEMURRER, AS ENTERED ON THE MINUTES, OF DATE APRIL 7th, 1913.

On motion of Mr. Dixon and pursuant to stipulation on file, it is ordered that the firm name of Dixon & Miller be, and is hereby entered and substituted as the attorney for plaintiff in the place of Augustus Tilden. It is further ordered that the firm name of Sweeney [5] & Morehouse be added as associate counsel for the defendant. By consent, and on motion of plaintiff, it is ordered that the demurrer herein be, and the same is hereby, sustained; and that plaintiff is given until the next Motion Day to amend his complaint.”

*In the District Court of the United States, for the
District of Nevada.*

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant.

Amended Complaint.

The plaintiff, by Dixon & Miller, his attorneys, complaining of the defendant, alleges as follows:

I. That at all the times herein mentioned the defendant was and now is a mining corporation organized and existing under the laws of the State of Arizona, and during such time has owned and operated and now owns and operates a certain mine in Inyo County, State of California, commonly known as and called the Keane Wonder Mine; and that during such time, the defendant has been duly authorized to do business within the State of Nevada, and has kept a place of business therein at which defendant has conducted and carried on its ordinary business.

II. That prior to the 9th day of December, 1911, the plaintiff was engaged and employed by the defendant to work as a miner and mucker in said mine, at the rate of \$4.00 per day, and pursuant thereto plaintiff was, on said 9th day of December, 1911, an employee of defendant in said mine and engaged in the line of his duty and in the course of his em-

ployment as such employee; that it became and was the duty of defendant to furnish plaintiff a safe place to work and safe ways, works, machinery and appliances therefor, and to use ordinary and reasonable care in its methods of operating said mine and extracting the ore, rock and other material therefrom; but defendant by and through its own negligence and the negligence and carelessness of its officers, agents and other servants, failed and neglected to furnish plaintiff with a safe place to work and safe ways, works, machinery and appliances therefor, and failed and neglected [6] to exercise ordinary or reasonable care in its methods of operating said mine and extracting the ore, rock and other materials therefrom; but on the contrary the defendant, its officers, agents and other servants negligently and carelessly drove a certain stope upward from a tunnel situated in said mine, and failed and neglected to use ordinary or reasonable care in the examination and inspection of the roof or top of said stope, and failed and neglected to pick or bar down from said roof or top of said stope, loose rock and ore therein or thereat; and caused and permitted the said plaintiff to work in the course of his employment in said tunnel at the bottom of said stope, while the said stope was in a dangerous condition owing to the negligence of the defendant, its officers, agents and servants, in not properly timbering the same, and in not properly examining and inspecting the same, and in not properly picking or barring down the loose rock at the roof or top of said stope; by reason whereof, a mass of ore

and rock fell from the top or roof of said stope on and upon the plaintiff while so engaged in the line of his duty and in the course of his employment, so that plaintiff was cut, scratched, bruised, wounded and hurt on left leg, back, and other parts of his body, and suffered excruciating pain and agony of body and mind, and was rendered sick, sore and lame, and his left leg was broken and splintered, and that in endeavoring to have the same healed and cured, it became and was necessary to have about two inches of said bone removed, so that said left leg is now much shorter than the right leg, and his nervous system has been greatly injured and disabled, and plaintiff was disabled from attending to his regular business and employment, or of performing any work up to the commencement of this action, and the making of this amended complaint; and his left leg and his back and his nervous system are permanently injured, paralyzed and disabled, so that he will be prevented and disabled from attending to his regular business as miner and mucker during the remainder of his life as he believes, and his earning capacity has been lost and destroyed, and he believes and therefore alleges, that he will, during the remainder of his life, be helpless and require the care and attendance of others.

III. That plaintiff has been obliged to expend large sums of money and [7] to incur liabilities for medical and surgical attendance, for medicines, nursing, board, lodging and travelling expenses in endeavoring to have himself cured of said injuries, wounds, bruises and maladies.

IV. That at the time of the said injuries so suffered by the plaintiff, and at the time of the commencement of this action, and at the present time, there was in force and effect in the State of California, a statute or law providing, among other things, that in any action to recover damages for a personal injury sustained within the State of California by an employee, engaged in the line of his duty or the course of his employment as such, in which recovery is sought upon the ground of want of ordinary or reasonable care of the employer, or of any officer, agent or servant of the employer, it shall not be a defense: (1) that the employee either expressly or impliedly assumed the risk of the hazard complained of, and (2) that the injury was caused in whole or in part by the want of ordinary or reasonable care of a fellow-servant.

V. And plaintiff says that by reason of said injuries and of the premises, he has suffered loss and damage, for loss of time at the rate of \$4.00 per day, for medical, surgical and hospital attendance, nursing, board, lodging and necessary travelling expenses, for mental agony and distress, for physical suffering and distress, for permanent injury and impairment of earning capacity, and for exemplary or punitive damages by reason of the gross and wanton negligence and carelessness of the defendant, its officers, agents and servants, in the sum of Fifty Thousand (\$50,000.00) Dollars.

Wherefore, the plaintiff demands judgment against the defendant for fifty thousand dollars,

for loss and damage sustained by him, with his costs and expenses of suit.

DIXON & MILLER,
Attorneys for Plaintiff.

State of Nevada,
County of Washoe.—ss.

A. Grant Miller, being first duly sworn, deposes and says: That he is one of the attorneys of record for the above-named [8] plaintiff, and that the attorneys for the plaintiff reside at Reno, in Washoe County, State of Nevada; that the above-named plaintiff is not now within said County of Washoe, and for this reason this verification is made by deponent; that deponent has read the foregoing amended complaint and knows the contents thereof, and that on his information and belief, he says the same is true.

A. GRANT MILLER.

Subscribed and sworn to before me this 9th day of May, A. D. 1913.

[Seal]

J. B. DIXON,
Notary Public.

Service of a copy of the within amended complaint admitted this 9th day of May, 1913.

SWEENEY & MOREHOUSE,
Attorneys for Defendant.

[Endorsed]: No. 1576. In the District Court of the United States for the District of Nevada. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, a Corporation, Defendant. Amended Complaint. Filed May 10, 1913. T. J. Edwards,

Clerk. Dixon & Miller, Reno, Nevada, Attorneys
for Plaintiff.

*In the District Court of the United States, for the
District of Nevada.*

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Corpo-
ration,

Defendant.

Answer to Amended Complaint.

Comes now the defendant, Keane Wonder Mining Company, a corporation, and answering plaintiff's amended complaint, admits, avers and denies as follows:

1. Admits that defendant is a mining corporation organized and existing under and by virtue of the laws of the State of Arizona. Admits that during all the times mentioned in said amended complaint it has owned and operated, and does now own and operate, a certain mine in Inyo County, State of California, commonly known as and called the Keane Wonder Mine. [9]

Denies that during the times mentioned in said amended complaint this defendant has been duly authorized to do business within the State of Nevada; denies that it has kept a place of business therein at which it has conducted and carried on or conducted or carried on its ordinary business or any other business at all.

Admits that on and prior to the 9th day of December, 1911, plaintiff was engaged and employed by this defendant to work as a miner and mucker in said mine at the rate of four dollars per day; admits that said plaintiff was so employed and was so working on said 9th day of December, 1911; admits that it was and is the duty of this defendant to furnish plaintiff, and all other employees, a safe place to work and safe ways, works, machinery and appliances therefor, admits that it was and is the duty of this defendant to use ordinary and reasonable care in its methods of operating said mine and extracting the ore, rock and other material therefrom, and in this behalf defendant avers the fact to be that at all times during plaintiff's employment as aforesaid defendant did furnish plaintiff, and all other employees, safe places to work and safe ways, works, machinery and appliances therefor, and further avers that defendant did use ordinary and reasonable care in its methods of operating said mine and in extracting the ore and rock therefrom.

Denies that by and through its negligence, or the negligence and carelessness of its officers, agents and other servants, or officers or agents or other servants, or either or any of them, defendant failed and neglected or failed or neglected to furnish plaintiff a safe place to work or safe ways, works, machinery and appliances, or safe works or safe machinery or safe appliances therefor; denies that it failed and neglected or failed or neglected to exercise ordinary or reasonable care or ordinary and reasonable care in its methods of operating said

mine and extracting or extracting the ore, rock and other materials or ore or rock or other materials therefrom; denies that this defendant, its officers, agents and other servants, or this defendant or its officers or agents or other servants, negligently and carelessly or negligently or carelessly drove a certain stope upward from a tunnel situated in said mine, and failed [10] and neglected or failed or neglected to use ordinary or reasonable care or ordinary and reasonable care in the examination and inspection or examination or inspection of the roof or top of said stope; denies that it failed and neglected or failed or neglected to pick or bar down or pick and bar down from said roof or top of said stope, loose rock and ore or loose rock or ore therein or thereat; denies that it caused and permitted or caused or permitted said plaintiff to work, in the course of his employment, in said tunnel at the bottom of said stope, or at any other place in said mine, while said stope or any other stope was in a dangerous condition owing to the negligence of this defendant or its officers or agents or servants, or either or any of them; denies that said stope was in a dangerous condition; denies that said stope was not properly timbered; denies that it did not properly examine and inspect said stope and said timbering or said stope or said timbering; denies that it did not properly pick or bar down or pick and bar down the loose rock at the roof or top of said stope; denies that by reason of said alleged improper timbering, or said alleged improper examination and inspection of the same, and said alleged failure to properly

pick or bar down the loose rock at the roof or top of said stope, a mass of ore and rock or ore or rock fell from the top or roof of said stope upon plaintiff while engaged in the line of his duty and in the course of his employment or in the line of his duty or in the course of his employment, as in said amended complaint set forth.

Admits that on or about December 9, 1911, while plaintiff was in said mine, a body of ore and rock fell upon plaintiff and broke his left leg and otherwise bruised and scratched him.

And defendant avers the fact to be that whatever injuries were sustained by plaintiff while in said mine were sustained by him while off duty and when not engaged in any work or duty by reason of his employment aforesaid, and in this behalf defendant avers the fact to be that plaintiff violated the positive instructions of this defendant and entered into an old abandoned stope in said mine for reasons and purposes unknown to this defendant, but known to defendant not to be for any purpose in the line of his duty or in the course of his employment, and not by reason of any order or [11] command of this defendant, and while therein, as defendant is informed and believes, and therefore alleges, plaintiff and one Porter, on their own behalf, and without authority or right so to do, explored certain ore bodies and broke down parts thereof, and while so engaged, a portion of said ore, so loosened by plaintiff and said Porter, fell upon plaintiff and said Porter, thereby causing the injuries complained of.

Denies that said injuries to plaintiff or the injuries

as alleged in his said complaint, happened to plaintiff or were inflicted while plaintiff was engaged in the line of his duty or in the course of his employment as such miner or mucker as alleged in said amended complaint; denies that the said injuries to plaintiff were the result of the negligence of this defendant or the negligence and carelessness of its officers, agents, and other servants, or either or any of them, in not properly timbering said stope, or in not properly examining and inspecting the same, or in not properly picking or barring down the loose rock at the roof or top of said stope, or in not furnishing plaintiff with a safe place to work or safe ways, works, machinery or appliances therefor.

Defendant has no information or belief upon the subject sufficient to enable it to answer the allegations of Paragraph *LL* of plaintiff's amended complaint, to wit: "and his nervous system has been greatly injured and disabled, and plaintiff was disabled from attending to his regular business and employment, or of performing any work up to the commencement of this action, and the making of this amended complaint, and his left leg and his back and his nervous system are permanently injured, paralyzed and disabled so that he will be prevented and disabled from attending to his regular business as miner and mucker during the remainder of his life, as he believes, and his earning capacity has been lost and destroyed, and he believes, and therefore alleged, that he will, during the remainder of his life, be helpless, and require the care and attendance of others," and basing its denial upon that ground, denies that plain-

tiff's nervous system has been greatly injured and disabled or injured or disabled; denies that plaintiff was disabled from attending to his regular business and employment, [12] or of performing any work up to the commencement of this action or the making of this amended complaint; denies that plaintiff's left leg and his back and his nervous system, or his left leg or his back or his nervous system are permanently injured, paralyzed and disabled, or permanently injured or permanently paralyzed or permanently disabled so that he will be prevented and disabled or prevented or disabled from attending to his regular business as miner and mucker during the remainder of his life, as he believes; denies that plaintiff's earning capacity has been lost and destroyed or lost or destroyed; denies that plaintiff will, during the remainder of his life, be helpless and require the care and attendance or care or attendance of others.

III. Defendant has no information or belief upon the subject sufficient to enable it to answer the allegations of Paragraph III of plaintiff's amended complaint, and basing its denial upon that ground, denies that plaintiff has been obliged to expend large sums of money or any sums of money, or to incur liabilities for medical and surgical attendance or medicines or nursing or board or lodging or travelling expenses, or either or any of them, in endeavoring to have himself cured of said injuries, wounds, bruises and maladies.

IV. Defendant has no information or belief upon the subject sufficient to enable it to answer the allega-

tions of paragraph V of plaintiff's amended complaint, and basing its denial upon that ground, denies that by reason of negligence or carelessness on the part of this defendant or of any of its officers, agents or servants, as alleged in said amended complaint, or otherwise or at all, plaintiff suffered loss and damage or loss or damage for medical, surgical and hospital attendance, nursing, board, lodging and necessary travelling expenses, or either or any of them, or for mental agony, or for physical suffering and distress, or for permanent injury and impairment of earning capacity, or for exemplary or punitive damages by reason of the gross and wanton or gross or wanton negligence and carelessness of this defendant or its officers, agents or servants, or either or any of them, in the sum of fifty thousand dollars, or in any other sum or at all.

And for a further, separate and second defense, defendant avers: [13]

I. That the injury to plaintiff, as in his said amended complaint alleged, was without any fault on the part of defendant, and was caused by the fault and negligence of the plaintiff himself in this; that in said mine, on December 9, 1911, were and are old, abandoned stopes which were and are not used for any purpose by defendant or its employees, and the fact was, and is, that at all times mentioned in said amended complaint, and now, this defendant had issued a standing order to all its employees, forbidding them to enter the old worked-out portions of said mine, and particularly the said abandoned stope hereinafter referred to, and had marked and desig-

nated a certain line in said mine known as the "dead line," beyond which all employees were forbidden to go. That this order was communicated to and known by plaintiff during the time of his employment as alleged in his said amended complaint.

II. That on or about December 9, 1911, while off duty, plaintiff violated said order, and without right, permission or authority, crossed said "dead line" and entered upon and into said abandoned and worked-out portion of said mine, and whilst in an abandoned stope therein, as defendant is informed and believes, and therefore alleges, plaintiff, and one Frank Porter, on their own initiative, and in their own behalf, and without authority or right so to do, explored certain ore bodies therein, and loosened and broke down parts thereof, and plaintiff then and there so negligently and carelessly conducted himself that by reason of his negligence and carelessness a part of the ore so loosened fell upon plaintiff, thereby causing the injuries complained of; defendant avers that at the time of said injury to plaintiff, as in said amended complaint set forth, plaintiff was not engaged in any work or duty by reason of any order or command of this defendant, or by virtue of his employment, as alleged in said amended complaint; and avers that if any damage or injury resulted to plaintiff, it was by the said negligence of plaintiff, and not the fault of defendant.

And for a further, separate and third defense, defendant avers:

I. That all times during plaintiff's employment by defendant as a miner in its said mine, and particularly

on December 9, 1911, said [14] mine was equipped with suitable and safe works, machinery and appliances therefor, and defendant furnished plaintiff therein safe places for him to perform all work in the line of his duties, or in the course of his employment, and in this behalf defendant avers that it was the duty of the plaintiff to make his own place to work; that on December 9, 1911, without fault or negligence on the part of defendant, plaintiff was injured in defendant's mine; that said injury was a risk or danger assumed by plaintiff in his said employment, and plaintiff knew, or ought to have known, all the risks and dangers incident to his said employment, and particularly the risks and dangers necessarily resulting from loosened rock at the roof or top of any stope in said mine, and particularly the dangers from the falling of such loosened rock or ore from the top of such stope,

And for a further, separate and fourth defense, defendant avers:

I. That if said injury to plaintiff, as alleged in said amended complaint, was due to the fault or negligence of any person other than plaintiff himself, it was by the want of ordinary or reasonable care of plaintiff's fellow-servants, and not by the fault and negligence of defendant, and in this behalf defendant avers that it was the duty of plaintiff and his said fellow-servants engaged at work in said mine on or about December 9, 1911, to break down and extract the ore therefrom, and in so doing it was a part of their duties to do such timbering as was necessary for the protection of themselves, or other employees, and the

mine itself, and it was the further duty of plaintiff and his fellow-servants to pick and bar down all loose rock, ore or other material at the roof or top of any stope in any place in said mine which would, in any way, be dangerous to plaintiff, or any other person in said mine; that if plaintiff was injured, as set forth in his said amended complaint, it was by the fault and negligence of himself and his fellow-servants in not properly picking or barring down, as was their bounded duty, the loose rock and ore which it is alleged fell upon and injured plaintiff.

And for a further, separate and fifth defense, defendant avers:

I. That the injury to plaintiff, as in said amended complaint alleged, [15] was occasioned by causes purely accidental, and by no reason of negligence or want of ordinary or reasonable care on the part of defendant.

And for a further, separate and sixth defense, defendant avers:

I. That at all the times mentioned in said amended complaint, defendant was, and is, a corporation, duly organized and existing under and by virtue of the laws of the State of Arizona, and having its principal office and place of business, at Keane Wonder, Inyo County, California, and there operated the Keane Wonder Mine; that the injury to plaintiff, as alleged in his said amended complaint, occurred at said mine in said State of California; that defendant, on the 9th day of December, 1911, was not, and is not now, engaged in business in the State of Nevada, and did not, and does not now, maintain an office therein; that at

all times since said 9th day of December, 1911, this defendant has continued to operate said mine, and has maintained its principal office and place of business in the said State of California, and its officers have resided therein, all of which was and is known to plaintiff.

II. That the said plaintiff by this action seeks to enforce a right given him under and by virtue of the laws of the State of California, Statutes of 1911, page 796, which said laws are materially and fundamentally different from the laws of the State of Nevada in relation to the same subject; and this defendant therefore respectfully pleads that plaintiff should not be allowed to assert and enforce in this Honorable Court, representing, as it does, the District of the State of Nevada, a right given him under the laws of the State of California which are materially and fundamentally different from the laws of the State of Nevada in relation to the same subject.

Wherefore, defendant having fully answered, prays that this action be hence dismissed, and that it have judgment or its costs herein expended.

SWEENEY & MOREHOUSE,

B. M. AIKINS,

Attorneys for Defendant.

GAVIN McNAB,

A. H. JARMAN,

Of Counsel. [16]

State of California,

City and County of San Francisco,—ss.

B. M. Aikins, being first duly sworn, deposes and says: That he is the attorney of record for the above-

named defendant, and resides and has his office in the City and County of San Francisco, State of California; that neither the above-named defendant nor any of its officers are now within said City and County of San Francisco, and for this reason this verification is made by the affiant; that affiant has read the foregoing answer to plaintiff's amended complaint and knows the contents thereof, and that on his information and belief, he says the same is true.

B. M. AIKINS.

Subscribed and sworn to before me this 14th day of July, A. D. 1913.

[Seal] CHARLES R. HOLTON,
Notary Public in and for the City and County of San Francisco, State of California.

Received a copy of the foregoing answer to amended complaint this 15th day of July, 1913.

DIXON & MILLER,
Attorneys for Plaintiff.

[Indorsed]: In the District Court of the United States for the District of Nevada. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, a Corporation, Defendant. Answer to Amended Complaint. Filed July 16, 1913. T. J. Edwards, Clerk. No. 1576.

*In the District Court of the United States for the
District of Nevada.*

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant.

Demurrer to Part of Answer.

Now comes the plaintiff, and demurs to the further, separate and fourth defense of the defendant contained in defendant's [17] answer, and for grounds of demurrer alleges:

I. That said separate and fourth defense does not set forth facts sufficient to constitute a defense to the plaintiff's cause of action as alleged in his complaint.

II. That it constitutes no defense to the plaintiff's cause of action as set out in his amended complaint that the injuries to the plaintiff were due to the want of ordinary or reasonable care of plaintiff's fellow-servants; nor to allege that it was the duty of the plaintiff's fellow-servants engaged at work in said mine to break down and extract the ore therefrom, and in so doing to do such timbering as was necessary for the protection of themselves or other employees and the mine itself; nor to allege that it was the duty of the plaintiff's fellow-servants to pick and bar down the loose rock, ore or other material at the roof or top of any stope in any place in said mine which would, in any way, be dangerous to plaintiff or any other

person in said mine; nor to allege that the injuries suffered by the plaintiff were caused by the fault and negligence of his fellow-servants in not properly picking or barring down the loose rock and ore which fell upon and injured plaintiff.

And the plaintiff further demurs to the further, separate and sixth defense of the defendant set out in his said answer, and for grounds of demurrer avers as follows:

I. That the said separate and sixth defense does not state facts sufficient to constitute any valid defense to the plaintiff's cause of action as set forth in his amended complaint.

II. That service of summons and complaint was made upon defendant within the State of Nevada.

III. That the defendant by filing demurrer and by answering to the merits has waived any benefit that might or could arise from any of the facts alleged in said separate and sixth defense.

IV. That it does not constitute any defense to the plaintiff's amended complaint to allege that the defendant has maintained its principal office and place of business in the State of California, or that its officers have resided therein. [18].

V. That the plaintiff's action is a transitory one, and may be brought in any State wherein the plaintiff is engaged in business or can be found, or service affected within said State.

VI. That the plaintiff in his complaint has specifically set out a portion of the laws of the State of California applicable to the plaintiff's cause of action

as being brought within the State of Nevada.

DIXON & MILLER,

Attorneys for Plaintiff.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

J. B. DIXON,

Of Counsel for Plaintiff.

Service of a copy of the within Demurrer, acknowledged this 7th day of August, 1913.

SWEENEY & MOREHOUSE,

Attorneys for Defendant.

[Indorsed]: No. 1576. In the District Court of the United States for the District of Nevada. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, a Corporation, Defendant. Demurrer to Part of Answer. Filed August 8th, 1913. T. J. Edwards, Clerk. Dixon & Miller, Attorneys for Plaintiff.

[Order Overruling Demurrer.]

ORDER OF COURT OVERRULING DEMUR-
RER TO ANSWER, AS ENTERED ON THE
JOURNAL, OF DATE OCTOBER 6th, 1913.

No. 1576.

JAMES CUNNINGHAM

vs.

KEANE WONDER MG. CO.

The demurrer to answer, and motion to strike therefrom, were this day argued and submitted by Mr. Dixon, of attorneys for plaintiff,—no counsel ap-

pearing for the defendant. In consideration of the premises, it is ordered that the motion to strike be, and is hereby granted, and the demurrer overruled.

*In the District Court of the United States for the
District of Nevada.*

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant.

Plaintiff's Reply [to Answer].

Now comes the plaintiff by Dixon & Miller, his attorneys, and for reply to affirmative matter set up in the answer of the [19] defendant, says as follows:

He denies that at all times during plaintiff's employment by defendant the defendant did furnish plaintiff with safe places to work and safe ways, works, machinery and appliances therefor; and denies that defendant did use ordinary and reasonable care in its methods of operating the mine referred to in the complaint and answer and in extracting the ore and rock therefrom.

He specifically denies each and every allegation, averment and particular contained in the last paragraph on page 4 of defendant's answer commencing at line 12 and ending at line 30.

He specifically denies each and every allegation, item and particular contained in paragraphs 1 and 2 of a further, separate and second defense contained

in the defendant's answer and commencing at line 23 on page 7, all of page 8, and continuing up to and including line 3 on page 9 of said answer.

He denies each and every allegation, item and particular contained in paragraph 1 of a further, separate and third defense contained in said answer and commencing at line 7 to and including line 25 on page 9 of said answer.

He denies each and every allegation and particular contained in paragraph 1 of a further, separate and fifth defense contained in said answer and commencing at line 25 and ending on line 30 on page 10 of said answer.

DIXON & MILLER,
Attorneys for Plaintiff.

State of Nevada,
County of Washoe,—ss.

A. Grant Miller, being first duly sworn, deposes and says: That he is one of the attorneys of record for the above named plaintiff; that the attorneys for said plaintiff reside at Reno, in the County of Washoe, in the State of Nevada; and that the above-mentioned plaintiff is not now within said county, by reason whereof dependant makes this verification; that he has read the foregoing Reply and knows the contents thereof; and on information and belief, says that the same is [20] true.

A. GRANT MILLER.

Subscribed and sworn to before me this 6th day of August, A. D. 1913.

[Seal]

J. B. DIXON,
Notary Public.

Service of a copy of the within Reply admitted this
7th day of August, 1913,

SWEENEY & MOREHOUSE,
Attorneys for Defendant.

[Indorsed]: No. 1576. In the District Court of
the United States for the District of Nevada. James
Cunningham, Plaintiff, vs. Keane Wonder Mining
Company, a Corporation, Defendant. Plaintiff's
Reply. Filed August 8th, 1913. T. J. Edwards,
Clerk. Dixon & Miller, Attorneys for Plaintiff.

[Verdict.]

*In the District Court of the United States for the
District of Nevada.*

No. 1576.

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant.

We, the jury in the above-entitled cause find for the
plaintiff and assess the damages at \$12,500.00.

Dated November 26, 1913.

BURT DAKE,
Foreman.

[Indorsed]: No. 1576. U. S. Dist. Court, Dist.
Nevada. James Cunningham, vs. Keane Wonder
Mining Company, a Corporation. Verdict. Filed
November 26, 1913. T. J. Edwards, Clerk.

[Judgment.]

*In the District Court of the United States for the
District of Nevada.*

No. 1576.

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant.

This cause came on regularly for trial at the October Term, 1913, to wit, on the 19th day of November, 1913, by a jury of twelve persons duly accepted by the parties and sworn to try the issue. [21]

The parties and their respective attorneys appeared, introduced their proofs, oral and documentary, and, after argument, submitted the cause; and the jury having been instructed by the Court as to the law of the case retired for deliberation and shortly thereafter came into Court with their verdict in favor of the plaintiff for the sum of twelve thousand and five hundred dollars.

It is therefore ordered and adjudged that the plaintiff have and recover of and from the said defendant, Keane Wonder Mining Company, a corporation, the sum of twelve thousand and five hundred dollars (\$12,500), with interest thereon from this date until paid at the rate of seven per cent per annum, together with his legal costs and disbursements herein incurred, taxed at \$438.95.

Dated and entered, this 26th day of November, 1913.

Attest: T. J. EDWARDS,
Clerk. [22]

*In the District Court of the United States in and for
the District of Nevada.*

No. 1576.

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

To the Honorable E. S. FARRINGTON, Judge of said District Court:

Now comes the Keane Wonder Mining Company, a corporation, by its attorneys, Messrs. Sweeney & Morehouse and A. H. Jarman, Esq., and respectfully shows:

That on the 26th day of November, A. D. 1913, a jury, duly empanelled, found a verdict against your petitioner and in favor of said James Cunningham, and upon said verdict, a final judgment was entered on the 14th day of March, A. D. 1914, against your petitioner, Keane Wonder Mining Company, a corporation.

Your petitioner, feeling itself aggrieved by the said verdict and judgment entered thereon as aforesaid, herewith petitions the Court for an order allowing

it to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States in such cases made and provided.

Wherefore, your petitioner prays that a writ of error do issue, and that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, sitting at San Francisco, in said Circuit, for the correction of the errors complained of and herewith assigned, be allowed, and that an order be made fixing the amount of security to be given by defendant, Keane Wonder Mining Company, conditioned as the law directs.

SWEENEY & MOREHOUSE,

B. M. AIKINS,

A. H. JARMAN,

Attorneys for Defendant, Keane Wonder Mining Company, Plaintiff in Error.

GAVIN McNAB,

Of Counsel.

[Indorsed]: No. 1576. In the District Court of the United States in and for the District of Nevada. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, a Corporation, Defendant. Petition for Writ of Error. Filed July 24th, 1914. T. J. Edwards, Clerk. Sweeney & Morehouse, A. H. Jarman, Attorneys for Defendant, Merchants' National Bank Building, San Francisco, California. Phone Douglas 520. [23]

*In the District Court of the United States in and for
the District of Nevada.*

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, (a Corporation),

Defendant.

**Order Allowing Writ of Error [and Fixing Amount
of Bond].**

Upon motion of B. M. Aikins, Sweeney & Morehouse, and A. H. Jarman, attorneys for the defendant, Keane Wonder Mining Company, a corporation, and upon filing a petition for a writ of error, and assignments of error,

It is ordered that a writ of error be, and it hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein, and that the amount of bond on said writ of error be, and the same is, hereby fixed at One Thousand Dollars (\$1,000) ; said bond to serve as a cost bond on said writ of error.

Dated, July 22, 1914.

E. S. FARRINGTON,

Judge of the United States District Court for the
District of Nevada.

[Indorsed]: No. 1576. United States District Court, District of Nevada. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, Defendant. Order Allowing Writ of Error. Filed

July 24th, 1914. T. J. Edwards, Clerk. B. M. Aikins, Sweeney & Morehouse, A. H. Jarman, Attorneys for Defendant. [24]

*In the District Court of the United States in and for
the District of Nevada.*

No. 1576.

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Corporation,

Defendant.

Bond on Writ of Error.

Know all men by these presents: That we, Keane Wonder Mining Company, a corporation, as principal, and United States Fidelity and Guaranty Company, a corporation, duly organized and existing under and by virtue of the laws of the State of Maryland, and duly authorized to execute bonds and undertakings in judicial proceedings pending in the courts of the United States, as surety, are held and formally bound unto James Cunningham, plaintiff in the above-entitled action, in the full and just sum of one thousand (\$1,000) dollars, lawful money of the United States, to be paid to the said plaintiff, James Cunningham, his administrators, executors or assigns, to which payment well and truly to be made, we bind ourselves, our successors, assigns, executors and administrators, jointly and severally by these

presents. Signed and dated this the 21st day of July, A. D. 1914.

Whereas lately, at a regular term of the District Court of the United States for the District of Nevada, sitting at Carson City, in said District, in a suit pending in said court, James Cunningham, as plaintiff, and Keane Wonder Mining Company as defendant, Cause No. 1576, on the Law Docket of said court, final judgment was rendered against the said defendant in the sum of Twelve Thousand Five Hundred (\$12,500) Dollars, together with interest and costs, and the said defendant, Keane Wonder Mining Company has obtained a writ of error and filed a copy thereof in the clerk's office of the said court, to reverse the judgment of the said court in the aforesaid suit, and a citation directed to the said James Cunningham, defendant in error, citing him to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit [25] to be holden at the City and County of San Francisco, in the State of California, according to law, within thirty days from the date hereof,

Now the condition of the above obligation is such that if said Keane Wonder Mining Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

In Witness Whereof said Keane Wonder Mining Company, a corporation, has caused its name to be hereunto subscribed by its President thereunto duly authorized, and said United States Fidelity and

Guaranty Company, a corporation, has caused its name to be hereunto subscribed and its corporate seal to be hereunto affixed by its officers thereunto duly authorized, this 21st day of July, 1914.

KEANE WONDER MINING CO.

By HOMER WILSON,

Its President.

UNITED STATES FIDELITY AND
GUARANTY CO., OF BALTIMORE,
MD.

[Seal]

By C. H. PETERS,

Its Attorney-in-Fact.

By ALFRED CHARTZ,

Its Attorney-in-Fact.

The foregoing bond on writ of error is hereby approved, this 22 day of July, 1914. This is not approved as a supersedeas.

E. S. FARRINGTON,

Judge of the U. S. District Court for the District of
Nevada.

[Indorsed]: No. 1576. United States District Court, District of Nevada. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, a corporation, Defendant. Bond on Writ of Error. Filed July 24th, 1914. T. J. Edwards, Clerk. Sweeney & Morehouse, B. M. Aikins, A. H. Jarman, Attorneys for Defendant. [26]

*In the District Court of the United States in and for
the District of Nevada.*

No. 1576.

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY (a Cor-
poration),

Defendant.

Writ of Error [Original].

United States of America,—ss.

The President of the United States to the Honorable E. S. FARRINGTON, Judge of the District Court of the United States for the District of Nevada, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between James Cunningham, plaintiff, and Keane Wonder Mining Company, a corporation, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said Keane Wonder Mining Company, a corporation, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings, with all things concerning the same, to the United States Circuit Court of

Appeals for the Ninth Circuit [27] together with this writ, so that you have the same at the City and County of San Francisco in the State of California on the 20th day of August, A. D. 1914, in the Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS, the Honorable E. S. FARRINGTON, United States District Judge for the District of Nevada, the 22d day of July, in the year of our Lord one thousand nine hundred and fourteen.

E. S. FARRINGTON,
Clerk of the United States District Court for the
District of Nevada. [27½]

*In the District Court of the United States, in and for
the District of Nevada.*

No. 1576.

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant.

State of Nevada,
County of Washoe,—ss.

James G. Sweeney, being first duly sworn, says that he is one of the attorneys of record for the

above-named defendant in the above-entitled cause; that on the 23d day of July, 1914, in the forenoon of that day, in the County of Washoe, State of Nevada, he served upon A. Grant Miller, the citation and writ of error in the above-entitled action, to which this affidavit is attached, in the office of the attorneys for the said plaintiff, in the Journal Building, on West Second Street, City of Reno, County of Washoe, State of Nevada, by delivering to A. Grant Miller a true copy of said citation and said writ of error hereto attached.

JAMES G. SWEENEY.

Subscribed and sworn to before me this 23d day of July, 1914.

[Seal] JEROME L. VAN DEUNKER,

Notary Public in and for the County of Washoe,
State of Nevada. [28]

[Endorsed]: Original. No. 1576. United States District Court, District of Nevada. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, Defendant. Writ of Error. Filed July 24th, 1914. G. J. Edwards, Clerk. [28½]

*In the District Court of the United States in and for
the District of Nevada.*

No. 1576.

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant.

Assignments of Error.

Now comes Keane Wonder Mining Company, a corporation, defendant in above named, and in connection with its petition for a writ of error in this cause, makes and files the following assignments of error upon which it will rely in the prosecution of its writ of error in the above-entitled cause and upon which it relies to reverse the judgment entered herein as appears of record:

I. The Court erred in granting plaintiff's motion to strike out the third defense of defendant's answer to plaintiff's amended complaint, in that, by so doing, this defendant was and is deprived of the defense generally known as assumption of risk, which was and is a valid and legal defense under and by virtue of the laws of the State of Nevada, but which is not a defense under the Roseberry Employers' Liability Act of the State of California, under and by virtue of which the above-named plaintiff prosecuted this action.

II. The Court erred in denying defendant's mo-

tion to dismiss said action for the reason that under the law of comity the above-entitled court will not and should not entertain jurisdiction of this action of damages for alleged injury to plaintiff while in the employ of defendant in the State of California, in that the said statute of the said State of California, under which this action was and is prosecuted, to wit, Roseberry Employers' Liability Act, Cal. Stat., 1911, is contrary to the law and public policy of the State of Nevada upon the same subject.

III. The Court erred in denying defendant's motion for a directed verdict in its favor or a nonsuit, for the reason that it affirmatively appears that this action is based upon a statute of the State of California, known as "Roseberry Employers' Liability Act, Cal. Stat., 1911," [29] for an alleged injury to plaintiff resulting from accident occurring on or about the 9th day of December, 1911, in Inyo County, State of California, and that said Act was and is contrary to the public policy of the laws of the State of Nevada upon the same subject, and that therefore the Courts of the United States should not and will not, under the law of comity, permit such an action to be prosecuted in this court. That this Court, therefore, has no jurisdiction of the subject matter of the action.

IV. The Court erred in denying defendant's motion for a directed verdict in its behalf or a nonsuit for the reason that it appears from the evidence that the property and the place of the business conducted and carried on by this defendant, Keane Wonder Mining Company, is in Inyo County, California, and

that this defendant at the time of said accident, resulting in alleged injuries to plaintiff, was and ever since has been exclusively engaged in business in the State of California, and has never removed from that State into the State of Nevada. That it therefore affirmatively appears that plaintiff could have prosecuted his action in the State of California, the place where he received his alleged injury, and that if judgment was recovered in said State it could be enforced under the laws of the State of California, it affirmatively appearing that the Keane Wonder Mining Company, owned no property in the State of Nevada out of which any judgment recovered in any court in said State could be satisfied or discharged to any degree whatever.

V. The Court erred in denying defendant's motion for a directed verdict in its behalf or a nonsuit, for the reason that the evidence in this case utterly fails to establish any negligence on the part of this defendant, resulting in or contributing to the alleged injuries of plaintiff.

VI. The Court erred in denying defendant's motion for a directed verdict in its behalf or a nonsuit, for the reason that there is no evidence in the case, introduced either by plaintiff or defendant, from which the jury could lawfully find that the said alleged injuries to plaintiff were sustained by him within the State of California, while engaged in the line of his duties or the course of his employment, by reason of the want of ordinary or reasonable care of this defendant or of any officer, agent or [30] servant of this defendant.

VII. The Court erred in denying defendant's motion for a directed verdict in its favor at the conclusion of all the evidence in the case for the reason that it affirmatively appears that this action is based upon a statute of the State of California, known as "Roseberry Employers' Liability Act, Cal. Stat., 1911," for an alleged injury to plaintiff resulting from accident occurring on or about the 9th day of December, 1911, in Inyo County, State of California, and that said Act was and is contrary to the public policy of the laws of the State of Nevada upon the same subject, and that therefore the courts of the United States should not and will not, under the laws of comity, permit such an action to be prosecuted in this Court. That this Court, therefore, has no jurisdiction of the subject matter of the action.

VIII. The Court erred in denying defendant's motion for a directed verdict in its favor at the conclusion of all the evidence in the case for the reason that under the law of comity, the above-entitled court will not and should not entertain jurisdiction of this action of damages for alleged injury to plaintiff while in the employ of defendant in the State of California, in that the said statute of the said State of California, under which this action was and is prosecuted, to wit, Roseberry Employers' Liability Act, Cal. Stat., 1911, is contrary to the law and public policy of the State of Nevada upon the same subject.

IX. The Court erred in denying defendant's motion for a directed verdict in its favor at the conclusion of all the evidence in the case for the reason that the evidence utterly fails to establish any negli-

gence resulting in or contributing to the alleged injuries of the plaintiff.

X. The Court erred in denying defendant's motion for a directed verdict at the conclusion of all the evidence in the case for the reason that there is no evidence that the alleged injuries to plaintiff were sustained by him within the State of California while engaged in the line of his duties or in the course of his employment, by reason of the want or ordinary or reasonable care of this defendant or of any officer, agent or servant of this defendant, and that, in particular, there is no evidence: [31]

a. Of any breach of a statutory duty;

b. Of any complaint by the plaintiff before said alleged accident that defendant's mine was unsafe or dangerous.

c. Of any knowledge on the part of defendant of a dangerous or unsafe condition of the mine or that the roof thereof was dangerous or was liable to fall;

d. Of any request by plaintiff or any other person that the roof of said mine be made safe;

e. Of any refusal or neglect by this defendant to make the roof of said mine safe after request made by plaintiff or any other person;

f. Or affirmative proof that even if defendant had made a more extended examination of the roof of said mine that the alleged defect might have been or would have been discovered by it;

g. Or affirmative proof that there was any loose rock or ore on the roof of said mine as alleged in said amended complaint;

h. Or affirmative proof of assurances by defend-

ant to plaintiff as to the safety of the place where plaintiff was injured after objections thereto made by plaintiff to defendant;

i. Or affirmative proof that appliances used by defendant were insufficient or inadequate;

j. Or affirmative proof that any of defendant's employees were incompetent;

k. Or affirmative proof of any lack of supervision on the part of defendant;

l. Or affirmative proof that defendant failed to make proper tests to determine the safety of the roof of said mine;

m. Or affirmative proof that defendant did not do its full duty in making the said mine a safe place for plaintiff to work;

n. That injury to plaintiff resulted from any failure of defendant to warn him of any danger known to or which should have been known to this defendant;

o. Or affirmative proof that an extra pillar was needed or that any [32] extra stulls or supports were needed at the place where the roof of the mine caved, or that defendant knew that any such were needed; nor is there any affirmative proof of any reason or cause which would or should have put defendant on notice that such pillars or stulls or supports were needed;

p. Or affirmative proof that had defendant placed the usual and customary stull or support at place where the roof of the mine caved that such stull or other support would have prevented the caving;

q. Or affirmative proof that any pillar in said

mine was removed which should have been allowed to remain;

r. Or affirmative proof from any witness that any rock in said mine was loose and was known or should have been known to defendant prior to the time of the accident; and there is no evidence to show that defendant had any cause to know that any rock in said mine was loose and liable to fall, to the possible injury of any of its employees, nor is there any proof that this defendant had any reason from any cause so to believe.

XI. The Court erred in instructing the jury as follows:

“The injury complained of occurred in the State of California, consequently we are governed by the law of that commonwealth in the particulars which I shall indicate. Formerly in California it was the law that the employee assumes the ordinary risks of his employment, and that he could not recover if he were himself guilty of contributory negligence, which negligence directly caused or contributed to cause the injury, or if the injury was the result of the negligence of a fellow servant. This has been changed by the statute of that state. Now in any action to recover damages for personal injury sustained in California by an employee while engaged in the line of his duty or in the course of his employment, on the ground of the want of ordinary or reasonable care of the employer, or of any officer, agent, or servant of the employer, it shall not be a defense that the em-

ployee, either expressly or impliedly, assumed the risk or the hazard complained of, or that the injury was caused in whole or in part by the want of ordinary or reasonable care of a fellow servant.

Furthermore, the fact that such employee himself may have been guilty of contributory negligence, shall not bar a recovery therein, where his contributory negligence was slight and that of the employer was gross in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee.

If you find from the evidence that said injury to plaintiff resulted from contributory negligence on the part of the plaintiff, and that no negligence is proven or established on the part of the defendant, or that the negligence on the part of the defendant, if any, is not gross in comparison with the negligence established on the part of the plaintiff, then I instruct you that if the plaintiff is guilty of contributory negligence which is more than slight negligence, he cannot recover."

in that said instructions in effect authorized the jury to find a verdict in favor of plaintiff under a law of the State of California which was and is contrary to the law and public policy of the State of Nevada upon the [33] same subject, and in that said instruction was and is an erroneous instruction as to the said law of the State of California, on the subject of contributory negligence, and under the facts of this case

is an erroneous instruction of the law as to assumption of risk applicable thereto.

XII. That said Court was without jurisdiction to enter judgment or any judgment in said cause against the defendant, Keane Wonder Mining Company.

XIII. That the said judgment so entered on the verdict of the said jury was contrary to and is against law, for the reason that there is no evidence that said alleged injuries to plaintiff resulted to him by reason of the want of ordinary or reasonable care of this defendant or of any officer, agent or servant of this defendant.

XIV. That the said judgment so entered on the verdict of the said jury was contrary to and is against law because the undisputed evidence in the case conclusively establishes that the plaintiff was guilty of contributory negligence which resulted in his alleged injuries, and in this behalf that the undisputed facts in the case conclusively establish that the contributory negligence on the part of plaintiff was not slight and that of the employer was gross in comparison. On the contrary, if there was any negligence established in the case on the part of plaintiff and defendant, that such negligence on the part of each was ordinary negligence and was not slight and gross by comparison but was equal.

XV. The Court erred in denying defendant's motion for new trial on March 14, 1914, for the following reasons:

a. That the evidence in the case is wholly insufficient to justify the verdict of the jury or to sustain

a judgment entered thereon;

b. That said verdict and said judgment were and are against law;

c. That the verdict of the said jury in favor of plaintiff in the sum of Twelve Thousand Five Hundred (\$12,500) Dollars, was and is excessive damages appearing to and which were given by the jury under the influence of passion or prejudice; [34]

d. That the denial by said Court of defendant's motion for new trial, if discretionary, was and is an abuse of discretion.

Wherefore said Keane Wonder Mining Company, a corporation, plaintiff in error herein, prays that the judgment of said court be reversed.

Dated July —, 1914.

B. M. AIKINS,
SWEENEY & MOREHOUSE,
A. H. JARMAN,

Attorneys for Plaintiff in Error, Keane Wonder Mining Company.

GAVIN McNAB,
Of Counsel.

[Indorsed]: No. 1576. United States District Court, District of Nevada. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, a Corporation, Defendant. Assignments of Error. Filed July 24th, 1914. T. J. Edwards, Clerk. Sweeney & Morehouse. B. M. Aikins. A. H. Jarman, Attorneys for Defendant. [35]

[Bill of Exceptions.]

*In the District Court of the United States, in and
for the District of Nevada.*

No. 1576.

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant.

Bill of Exceptions to be used by defendant on its Motion for New Trial of the above-entitled action, and on any Writ of Error hereafter allowed to the United States Circuit Court of Appeals for the Ninth Circuit, to review the Judgment heretofore entered herein.

Be it remembered that on the 19th day of November, 1913, at 1:30 o'clock P. M. of that day, at a stated term of the District Court of the United States, in and for the District of Nevada, the above-entitled case came on for trial, before the Honorable E. S. Farrington, District Judge, presiding, plaintiff being represented by Messrs. Dixon & Miller, and the defendant being represented by Sweeney & Morehouse and A. H. Jarman. A jury was duly impaneled, and the following proceedings had:

The jury, after being sworn, is excused until Thursday, November 20th, 1913, at 10 o'clock A. M., and the Motion of Strike out parts of the Answer is argued by the respective counsel.

Mr. DIXON.—I will read the motion to strike.

(Reads motion.) In case this motion is allowed, we will not press our other motion to amend the reply. That motion is simply in case we are not entitled to have the paragraph in the answer stricken out.

Mr. MOREHOUSE.—If your Honor please, as I understand the law applicable to the Federal Courts, this court will take judicial notice of the statute of California. Probably it might be well for plaintiff to plead it, but if they desire to use the statute of California, I understand the rule to be that the Federal Courts will take judicial notice of the statute.

An action has been brought here under a statute of California, and if counsel are not going to insist upon their own motion, one of the grounds [36] upon which I shall make a motion will not arise at this time, but will necessarily arise during the course of the trial.

Assuming that the motion to amend the reply is to be presented, and is now presented to the Court, I would be in a position to raise the questions that I desire to raise; and they are: First, that the Court has no jurisdiction to proceed with the trial of this cause under the statute of the State of California, for the reason that the statute is in conflict with the public policy of the State of Nevada; and, second, that the statute of the State of California is not compulsory, but is a matter of the election, either of the employee or the employer, as to whether they will come under the provisions of this statute, and that they cannot select one provision of a statute, unless the entire statute be reviewed by the Court. The averment that the employer has failed to elect to come

under the provisions of this act, at this very moment destroys the right of the prosecution of this action; and therefore the court should refuse to permit the prosecution: First, under the law of comity, and secondly, for the reason that it will appear by the pleadings in this reply that the act does not apply to the cause of action, or attempted cause of action, set forth in plaintiff's complaint.

The COURT.—The motion to strike the third defense from the amended answer on page 9 of that document, will be granted. The motion to amend the reply I will not rule on at present.

Mr. MOREHOUSE.—I understand your Honor has not passed on the question that the action cannot be prosecuted under this statute; that the Court would have no jurisdiction of this action by reason of the allowance—if it is allowed—of the amendment to the reply, on the ground that the employer was not under the provisions of this act?

The COURT.—I have not passed on that yet.

Mr. MOREHOUSE.—I do not know whether this is the proper time to make a further motion that we wish to make, because it is quite important in determining the method by which we shall proceed, if we are ruled against.

The COURT.—You can state your motion, cite the authorities, and go right on with the case. I think I understand the point, and it is merely [37] a question of what the law is, and involves an examination of some authorities.

Mr. MOREHOUSE.—If your Honor please, we move that this cause of action be dismissed upon the

theory that under the law of comity, your Honor will not entertain jurisdiction for the reason that the action being brought under a specific statute of the State of California, that such statute is contrary to the law and public policy of the State of Nevada.

It is averred in the complaint that the defendant is a resident and maintained offices, and so forth, in the State of Nevada at the time of the bringing of this action, and at the time that the accident occurred, During the course of the trial, we will present proof to show that the defendant has never in the last six or seven years had any offices or headquarters in the State of Nevada. We have denied that allegation specifically in the complaint, and we will ask to have the testimony offered on that point during the course of the trial, submitted with the motion.

The COURT.—Very well.

Mr. MOREHOUSE.—And further, that there is no reason set forth in the complaint why the parties should leave the *lex loci*, which is the forum of California, and come into this court, and ask this court, as the *lex fori*, to apply the doctrine in this case.

The COURT.—This case was brought in the State court, and removed here by you?

Mr. MOREHOUSE.—Yes, your Honor. I would ask, if your Honor please, to save an exception to the ruling striking out the third defense.

The COURT.—The exception will be noted. You may proceed.

(The pleadings are read to the jury by respective counsel, and the opening statement on behalf of plaintiff is made by Mr. Miller.)

**[Testimony of James Cunningham, in His Own
Behalf.]**

Mr. JAMES CUNNINGHAM, the plaintiff, called as a witness in his own behalf, testified as follows:

Direct Examination by Mr. MILLER.

My name is James Cunningham. I reside in Goldfield, State of Nevada. For the last number of years I have been working quite a little in the [38] mines, as a mucker. I first started in to work in the mines the latter part of 1906, but I have done some other work as well. I was born in 1881. In the month of December, 1911, I was mining at the Keane Wonder Mine. At that time that mine was operated by the Keane Wonder Mining Company, the defendant in this action. I went to work for the Keane Wonder Mining Company some time about the 9th of October, 1911.

On the 9th day of December, 1911, I went on shift at half-past seven in the morning. My shift was to be until half-past four in the afternoon. The work which I began to do on that day was mucking. I entered the mine by means of a tunnel. I first started in to work at a pillar, shovelling into a chute there; shovelling rock into the chute. The place where I was working is called a stope. There were about twenty-two men working in that stope.

Mr. MILLER.—If the Court please, I have here a drawing of a portion of that mine, including the tunnel and the stope referred to, and I desire to have the witness mark upon this map certain posi-

(Testimony of James Cunningham.)

tions for the purpose of illustrating the evidence.

The COURT.—“Do you propose to offer it in evidence?”

Mr. MILLER.—“I am not certain as to that, your Honor. At this time I want to have these positions marked for the purpose of illustrating the evidence, and use it for that purpose, but I am not certain as to its introduction.”

Mr. MOREHOUSE.—“If counsel wants to use it as a method of illustrating, just like something he would draw himself, of course I cannot have any objection to it, and I presume it is perfectly legitimate, but if it is for the purpose of showing this is an accurate description of the underground workings, pillars, stopes and trackage, of course I shall object to it, if it is offered as evidence.”

The COURT.—“Then it cannot be admitted as evidence until it is offered, and its accuracy is testified to; otherwise I understand there is no objection. It is not in evidence.”

Mr. MILLER.—Q. “Mr. Cunningham, I show you this map, and ask you what it purports to represent?

A. It represents the stope we were at work in.”

[39]

The COURT.—“Now, gentlemen, this is going into the record, and under the ruling, the map or paper itself does not go in, the testimony cannot be explained. It seems to me if the witness is going to testify with reference to that, it had better be admitted in evidence, with the restrictions already suggested, that it can be used for the purposes of illus-

(Testimony of James Cunningham.)

tration, but not for the purposes to which you have objected, otherwise the testimony will not be very clear in the record."

Mr. MOREHOUSE.—"I have no objection to that. If plaintiff wishes to show it as a memorandum, illustrative of his testimony, to that I have no objection; but if counsel proposes to introduce it in evidence later on, as anything accurate on which he can base an argument to the jury, if it is a fact that the jury is to be guided by, then I object to it."

The COURT.—"Then it may be admitted simply as illustrative memoranda, is that the idea?"

Mr. MOREHOUSE.—"That is it, exactly."

The COURT.—"The order can be made in that way, that it is illustrative of the witness' testimony, but not in any manner as showing the condition of things."

Mr. MILLER.—"Not as an official map."

Mr. MILLER.—"Let it be admitted and marked under the restrictions so stated by counsel, for the purposes indicated, and afterwards if we are able to show it is an accurate map, we can make an offer of it for other purposes."

Mr. MOREHOUSE.—"That is satisfactory."

(Map marked plaintiff's Exhibit No. 1.)

Mr. MILLER.—"Mark with the figure one, Mr. Cunningham, the point on the stope where you were injured—just the figure one at the place where you were injured. (Witness marks on map.) Have you that marked? A. Yes."

I worked, shovelling rock from the pillar, for

(Testimony of James Cunningham.)

about an hour at the place where I started to work on the morning of the 9th of December.

Mr. MILLER.—Q. “At what point in the stope did you begin work the morning of the 9th of December— You may mark that with the figure 2?”
[40]

(Witness marks the point on the map as directed.)

After that the foreman, Mr. Roper, put me to work where I was hurt, and I put in a switch there. We finished putting in the switch near noon, when Mr. Roper, the foreman, said he was going to the Whip Saw, and left me working there, with instructions to put in a set of rails when there was room.

I worked shovelling into a car, until about ten minutes of four, and I was just throwing a shovelful into the car, and I was caught here (indicating), and knocked over a little bit, and was just caught in that position—just tipped over—and to the left of me the rock kept falling down, and it raised up six or seven feet; then it rolled down on my left side, so from this side I was covered up, from about here (showing); and I heard Mr. Porter then hollering over on the other side there; he was about here (indicating on map), and there were three or four Mexicans there, and two or three Italians, started taking Mr. Porter out, and they couldn't get him out; then these Mexicans came and took me out; and when they rolled the rocks off me they found this leg broked—smashed; I put my hands down, one on each side, and held it that way (illustrating), until I was carried to the mill. It was a slab of ore,—a slab of rock,

(Testimony of James Cunningham.)

which struck me, which came from the roof. The roof was about from sixteen to twenty feet above my head. Approximately seventy ton of rock fell.

Q. "Had you worked in this part of the mine before that day? A. In that part of the mine?"

Q. Yes, in the stope—had you worked in that stope before the 9th of December?

A. Yes, that is the only place I ever worked, in that stope."

I don't remember just where I was working on the 8th of December. I did not work at the particular place where I was injured, theretofore.

Q. "You were shovelling rock, you say, into the car; was that rock or ore, or what kind of material was it? A. It was ore.

"Q. It was ore? A. Yes."

The ore which I was shovelling was broken down by machine, a shift or two before that; some of it maybe there a week. The vein or ore-body varies from twenty to sixty feet; that is a flat or [41] blanket vein. The thickness of the ore at the particular place where I was injured, from the footwall to the hanging-wall, was close to twenty-five feet, or more. The ore or rock that fell on me, fell from the top over my head. There were no ore bodies anywhere near me, aside from the rock in the top—the ore in the top above my head. The distance between the place where I went to work first on the 9th of December, and the place where I was injured, was about fifty or sixty feet. I cannot say exactly in what direction the place where I was injured was,

(Testimony of James Cunningham.)

from the place where I went to work.

Q. "How or in what manner, if at all, was the roof of that stope supported?

A. It wasn't supported by anything.

Mr. MOREHOUSE.—Q. You say it was not supported? A. No, sir.

"Mr. MILLER.—Q. At the place where you were injured, indicated on this map by the figure one, was there any timbering? A. No, sir.

Q. At the place where you were injured were there any means whatever in use at that time to keep the rock on the top of the stope from falling?

A. No, sir.

Mr. MILLER.—Q. When you filled your car in so mucking, what did you do with the car, if anything?

A. When I filled the car?

Q. Yes, if you got a car loaded, mucking, what did you do with it, if anything?

A. Ran it to the chute, and dumped it in the chute. The chute was approximately thirty feet from the place where I was injured. The name of the foreman at that time was George Roper. Roper directed me to work at the particular point where I was injured. He said to go ahead and work here, and when you get room for a set of rails, put them down. Mr. Roper was there with me that morning for two or three hours.

Mr. MILLER.—Q. "What instructions did Mr. Roper give you as to the ore you were mucking?

A. He said when you get the switch in, he says go ahead and work here, and when you get room for

(Testimony of James Cunningham.)

a set of rails, put them down; that is all he said."

The work of shovelling ore into the car was included in the instructions given me by Mr. Roper. We used a candle for light. Three or four candles would do one for a shift of eight hours. I had one candle burning at the time that I was injured.

Q. Did you make any examination, Mr. Cunningham, of the roof of that [42] stope, or the place where you were injured, before you were injured?

A. No, sir.

Q. You said it was about sixteen feet above your head, the roof; were there any means there by which you could have reached the roof to examine it?

A. No, sir, not that I seen.

Q. Did Mr. Roper make any examination of that roof that morning while he was in there? A. No.

The COURT.—Q. "You say there were no means to make any examination?

A. Not that I seen."

Referring to the tunnel which I entered to go to work, and the stope, the tunnel is higher than the stope. The way we used to go to work when they were running that tunnel, over to where there was a stairway and ladder, and go down five or six feet, and then the stope was a kind of a grade to it, you know; it wasn't just altogether level, so that I could not say the distance. I never received any instructions, other than those I have already testified to, as to the work that morning.

Mr. Keith was the superintendent at that time. He never gave me any general instructions, rules or

(Testimony of James Cunningham.)

regulations as to my work in the mine, and I never saw any instructions, rules, or regulations printed or stuck up any place.

Mr. Keith was in the mine on the 9th of December, in the forenoon. I had no conversation with him. My partner, Mr. Perez, was working ten or twelve feet from me at the time I was injured. There were also three or four Mexicans working close. Yes, Mr. Guerra was there.

“Q. You have stated something about Mr. Porter, where was Mr. Porter?

A. Well, he was working on the machine there in the stope.

Q. Where was he at the time of this injury which you received?

A. Oh, he was about twelve or fifteen feet from me.”

They got me out of the rock, and took me to the mill, which was about a mile and a quarter from the mine. They carried me out of the stope—by the same way that we went to work in the mine, up the ladder-way, and out the tunnel. My leg was broken.

“Q. Did you receive any other injuries by reason of that fall of rock? A. At that time?

Q. Yes, were there any other injuries on your body of any kind?

A. At that time this arm (indicating left arm) was paralyzed from the blow, and there was several scratches all over my body; this other leg here was hurt pretty bad here on the outside, outside of my leg [43] and my back was hurt.”

(Testimony of James Cunningham.)

After they got us to the mill they put us into a house there, and sent to Rhyolite for the doctor. I remained in the mill until 5 o'clock the next morning, when Doctor Wheeler came, from Goldfield, and I was taken to Goldfield, by automobile. Doctor Wheeler and some man that was with Doctor Wheeler, accompanied me. After they got me to Goldfield they operated on me,—Doctor Wheeler and Doctor Dunham. This operation was performed at St. Mary's Hospital. I believe that I was in St. Mary's Hospital in Goldfield for about eight months and five days. At the time that I was injured I felt pretty bad; I could find my leg as I was holding it, I could find the bone splintered, and it was almost broke off, and I felt pretty bad. This did occasion pain. I was suffering pain pretty bad for a month.

I never got the better of the effect of the injury. This leg now, it is terrible pain, right at the break here, like rheumatism; and it is pretty bad sometimes for two or three days; and when I am walking with it, walking down a hill, sometimes my knee is a little weak, or something, and bends forward, and I have to push it back. And I am nervous; I tried to work last summer, and I had to quit. I worked two shifts and one hour. I quit because my leg swelled up, and got so sore; I was helping a blacksmith, and my back hurt me, and I had to quit the job. Since the 9th day of December, 1911, up to-day, I have worked two shifts and one hour. I am not able to work.

In 1906 I started in first to work in the mine. Before 1906 I was firing boilers in Rock Springs, Wyo-

(Testimony of James Cunningham.)

ming. I have not done any work except that of common laborer. I have not got very much of an education. I know no other trade aside from what I have testified. For my labor as mucker I receiver four dollars a shift, from the Keane Wonder Mining Company. After I got out of St. Mary's Hospital in Goldfield I rented a house, and am still living there, in Goldfield. Doctor Wheeler has attended me as a physician. Several times I bought medicine, that I saw advertised for rheumatism,—for this pain that is here. Doctor Wheeler took care of me while I was in the hospital, and the nurses there. No one has taken care of me since I left the hospital. I can't just tell you now how much [44] money I have paid out for medicine or care on account of this injury. I am paying eight dollars a month for the house I have rented; and I bought medicines, and bandages. I do owe money on account of these injuries; I owe money in the restaurant in Goldfield; and this man that I had the cabin rented of, he said that he would not ask anything of me until I would be able to pay it. I owe nothing for doctors or nurses, or hospital, so far as I know. I don't know whether Doctor Wheeler was paid for his services or not; he told me he wasn't. I didn't pay him anything. Doctor Wheeler attended me all the time I was in the hospital, and after I left the hospital for a couple of weeks.

“A. Well, it has worried me quite a lot this thing, how I am going to make a living, or what is going to happen; and I am nervous, feel nervous, can't sleep

(Testimony of James Cunningham.)

at night, nobody is going to hire a cripple and I feel pretty bad."

There has been a change in my general health since the injury; I feel nervous and weak all the time, and have lost about sixteen pounds. Before the injury I was in good health, and was physically strong.

Cross-examination by Mr. MOREHOUSE.

I was born in eighteen and eighty-one. I was born in Ireland. I first came to Nevada in 1906. I worked on a farm in Ireland. I left Ireland in 1903. I reached New York first, and remained there about a month, during which time I didn't do anything. After that I went to Rock Springs, Wyoming, on a railroad train. I paid my own fare. I was in Rock Springs three years. I was shovelling coal, and working in a boiler room for about a year, and I was firing boiler there for about two years. From Rock Springs I went to Tonopah. I was back and forth there several times; I don't remember just how long I was there. I went to work for the Tonopah Extension as a mucker, in the latter part of 1906. It was a deep mine, underground. I worked there about three months, as a mucker, and running car. There were drilling machines around where I was working. There were several men around the machine. I did not work under one of these men. I was under a foreman, who gave me instructions. I knew what I had to do. In mucking I used a pick and shovel, and a hammer. I had no bar for determining by drumming, the points where I was working. I [45] used the hammer for breaking boulders, breaking the

(Testimony of James Cunningham.)

rock before it was put into the car.

“Q. Was that mine timbered?

“A. Yes, sir, it was timbered.

“Q. What examination would you make of the surface of the drift?”

“A. I never would make any.”

The surface of the drift—from the floor of the drift, was around six feet. I never made any examinations of the surface of the drift. I had no means of determining the character of the roof of the drift, or the sides of the drift, or the floor of the drift, or of determining the solidity of the rock, or necessity of timbering. After I worked there about three months I came to Goldfield. The first place I went to work was at the Mohawk. It was a shaft mine. I was mucking in the Mohawk mine, sometimes in a stope, but mostly in the drifts. I would fill my car, and run it over to the cage, and it would be brought up by a cage, in that mine. I don't remember the depth of the first level in the Mohawk. There were many other people working there on the same shift. I went to work in—I am not sure whether it was January or February, and I worked till that panic came on. By the panic I mean the time that the men were paid in scrip. It was several months. During that time I acted as a mucker in the mine, under a foreman or shiftboss.

“Q. Do you know what drumming is in a mine?

A. No.

Q. And all this time you have been working as a mucker in a mine in Tonopah, and in a mine in Gold-

(Testimony of James Cunningham.)

field, you never heard of such a thing as drumming?

A. Drumming? No." I never heard that word before. I had no instructions,—only simply to gather up the muck, put it in the car, run down the car-line to the cage. That was the work.

"Q. And to do that you were given a pick and shovel and sometimes a hammer when you had to break the boulders? A. Yes."

"Q. No other instruments at all were given you?"

"A. No, sir." I stayed around Tonopah. I didn't do any work for eight or ten months. The mines were running in Tonopah, but there were so many idle men in the country you couldn't get anything to do. I think the first work I did after we were laid off at the Mohawk was at Tecopa, worked on a railroad grade, about three months or so. I went from [46] there to the Johnnie Mine, in Nevada. I was top-man there. It was an incline shaft. I worked there three or four months. Then I went to Park City, Utah, and worked there firing boilers, for about a year. Then I went back to Tonopah, where I went to work on the Mizpah, mucking. I worked there from January to the latter part of July, 1911. I used a pick and shovel, and a hammer. I had no bars for the purpose of finding out what the surface of the stope or the drift was, whether it was solid or compact, dangerous or not dangerous. I had no instructions of that kind in that mine. My instructions were simply to take up the muck and put it into a car, and run it out to the cage and let it be taken up to the surface. I was under a foreman during all

(Testimony of James Cunningham.)

this time. I left Tonopah about the first of September, and went down to the Borax Mine, and couldn't get any work there, and went from there to Skidoo, and couldn't get anything to do there, and I went from that to Keane Wonder. I believe it was about the 9th of October, 1911, when I went to work at the Keane Wonder Mine. Mr. George Roper employed me, he was the foreman of the mine.

"Q. And he employed you at \$4.00 a day?"

"A. Yes."

"Q. What did Mr. Roper tell you when he employed you?"

"A. He asked me if I was a miner when I asked him for a job and I told him no. Well, he says, 'I will give you a job mucking.' I told Mr. Roper I was a mucker."

I got the pick and shovel, and went in there and went to work. He hired me to go to work. He went with me and showed me the place to start in. I didn't notice what work had been done in the mine where I went to work on the 9th day of October, 1911. There had been men working there. There had been stoping.

"Q. Were there any pillars in there? A. Yes.

Q. Was there any timbering in there?

A. Yes, there was a few stulls in the stope.

Q. A few stulls,—no square-sets, or anything of that sort? A. No, sir.

Q. And was the stope a large or a small stope?

A. Oh, it was a pretty large stope.

Q. Was there more than one stope?

(Testimony of James Cunningham.)

A. I only know of one."

When I went to work I started in where the boss showed me. I didn't look around the stope to see what was done, or anything else. It was in [47] a stope.

"Q. Was it a large stope or small stope?

A. A pretty large stope.

Q. Was the roof of the stope protected by pillars or by timbers? A. No, sir.

Q. It wasn't protected at all?

A. Not where I was working.

Q. How large was the stope where you went to work that was not protected, either by pillars or timbers?

A. Well, there is a few pillars in the stope, and a few stulls.

Q. Then there were some pillars in the stope?

A. Yes.

Q. What are the pillars?

A. Part of the ore left.

Q. Part of the ore left? A. Yes.

Q. And what is it left for?

A. It is left to protect the mine.

Q. To protect the mine. It stands there then a solid body of ore or earth, to hold up the roof of the stope, doesn't it? A. That is what it is left for.

Q. And where there is one left there is no use for any timbers, is there?

A. Oh, yes, you have got to timber it.

Q. Always—do you always have to timber it?

A. It all depends on how wide them pillars is.

(Testimony of James Cunningham.)

Q. Precisely, and the width of the stope?

A. And the width of the stope."

Mr. MOREHOUSE.—Q. "Do you remember, Mr. Cunningham, how many pillars there were at the point where you were hurt on December 9th, I think it was, 1911?

A. Well, there was some pillars there quite a distance away from one side, and I was close to a pillar on another side."

"Q. Pretty well worked out—were you working all the time against the face of the ore body?"

"A. But we were working several places all over the stope."

"Q. I understand, but you were always working in an ore body, were you not?"

"A. Sometimes at a pillar."

"Q. What is that?"

"A. Sometimes they took ore from a pillar."

Q. At the time you were hurt, the work was on the face of the ore body?

A. Yes. We would leave several pillars all over the stope there.

Q. Well, let me illustrate that, if I can. Let me take this line here; you can see that line from where you are, the line drawn like that? (Referring to map placed on board by counsel for defendant. Defts. Ex. —.)

(Witness looks at map.) It don't look like the stope I was in at all. I don't know what level; I only worked on the one level. I would go in from a tunnel on a hillside to get in on the level where I was work-

(Testimony of James Cunningham.)

ing. Then I would go [48] in a portion of territory that had already been worked out, and turn to the left to get in to where I was at work, and down a ladder into the stope. The ladder was five or six feet long. Whereabouts is that level on there?

“Q. I don’t know. If your Honor please, may I have Mr. Wilson explain the whole map, that is, the points of it, at this time. Have you any objection?”

Mr. MILLER.—“For the purpose of locating the entrance tunnel, the incline shaft, the ladder which the witness has referred to, and the point where the plaintiff was hurt, I make no objection.”

Mr. MOREHOUSE.—Q. “Now, Mr. Cunningham, did you get an idea of that map? You don’t understand this map at all then, to the north of the hillside? A. No.”

I don’t understand this number 4 tunnel as the entrance that I would go into the place where I was working; I don’t understand this is the point where a little ladder let down to this point below, constituting the workings of this map; I don’t understand it. I know who made this map. (Referring to Plaintiff’s Exhibit No. 1.) It was Mr. Keith’s helper, on the 11th and 12th of December, 1911, helping to survey the stope. I understand this map thoroughly. The name of Mr. Keith’s helper is Lezerivch.

“Q. Now, he represented to you that the next day after you had been hurt that he was in this mine with Mr. Keith, and Mr. Keith was making a map or survey of the mine at that time? A. Yes, sir.

(Testimony of James Cunningham.)

Q. Did he also represent to you that Mr. Wilson and Mr. Keith were together making that map?

A. Well, he didn't mention Mr. Wilson; he said Mr. Keith and himself.

Q. And they had surveying instruments, and made proper measurements? A. Yes, sir.

Q. And he just drew this out from memory—or did he draw it from data which he had in his possession?

A. Well, there is a part of it—oh, he just drew it out as a sketch map.

Q. Just drew it as a sketch map? A. Yes.

Q. When did you get this map?

A. About four or five months ago."

Yes, there is a car-track on this map. These are marks representing [49] car-tracks. (Indicating on Plaintiff's Exhibit 1.) The blue lines represent air-pipes; and the dark bodies represent ore bodies or pillars, and the vacant white represents worked out properties. I was working where this figure 1 is. This little red line here represents the switch that I put in under the instructions of Mr. Roper. Mr. Roper helped me to put in the switch; then my partner and me put in a set of rails, at the end of the switch. That figure 3 represents the switch where we put in the rails. And this red line running over here to what is marked "Chute" was the car-line over which we ran our cars to dump into the chute. Mr. Porter was working here. (Indicating on map.) (The point indicated by the witness is marked "5" on the map.) I was working that day down here in the first part of the shift; I was working here at this

(Testimony of James Cunningham.)

pillar running into this chute; and Mr. Roper came along and took me over here to put in this switch, and that is where the cave was where I got hurt. Yes, the cave was here at this switch.

Mr. MOREHOUSE.—Q. “This point where you have the figure 1 is where the rock fell from the roof of the stope onto you?”

A. Yes, sir, it took in quite—it took in all that in there, it covered the switch.

Q. It covered the switch? A. Yes.

Q. And who was working with you there at that time, if anyone?

A. This man who is here, Mr. Perez.”

The car was about there on the track (indicating on map), and he was over there on the other side of the track, and there was a machine up in here. The machine was where that green line is run. (Point marked “6” on map.) About seventy tons of rock fell. I don’t remember just how many pounds there are in a ton. I don’t know how many cubic feet there are in a ton of ore. The cars we were using on the track would not hold a ton.

“Q. So when you say seventy tons, that is a mere matter of guess? A. That is all.”

I was working between the switch and the track, and the point where the figure 1 is on this map.

“Q. Do these things at all represent the outline of the ore bodies?”

A. Yes, it looks to me—it looks like the stope looked at that time.”

I went into the mine through a tunnel. This place

(Testimony of James Cunningham.)

on the map represents [50] the tunnel that you enter from the hillside. Then you came along to a certain point, and would go down a little stairway, four or five feet. The stairway would be here (indicating on map). (Point is marked 7 on Plaintiff's Exhibit No. 1.)

“Q. Then wasn't all this territory in here worked out, except here and there a pillar standing to hold the roof?

A. Well, at that time that was about all the ore there was in that stope.

Q. That was about all the ore there was in that stope? A. Yes.”

I went and turned to the left, and down here, and came over this open cut here, is the way I went to work that morning, and right down here to this pillar—started in shovelling in that chute.

“Q. You know there were pillars in that mine?

A. Yes.

Q. You know what they were left there for?

A. They were left there to protect the mine.

Q. They were left there to protect the mine, and to protect the roof of the mine? A. Yes.

Q. And to prevent the falling of the roof onto the floor of the stope? A. Yes.

Q. Now, I understood you to say yesterday the height of this stope was what?

A. Well, it ran all the way from twenty to sixty feet, I believe.

Q. The height of the stope from the floor to the roof? A. Yes.

(Testimony of James Cunningham.)

Q. You are just guessing at that, are you not?

A. Just guessing.

Q. In fact, the location of all this, is a mere matter of guess with you?

A. That looks awful like the stope.

Q. I understand it looks like it, but in reality it is all guesswork?

A. It is a sketch map of the stope. This man that gave me this told me from this point here (indicating), till a point on this chute there, was eighty feet; from where I was to the same point on the chute, was fifty-six feet. The day I was hurt there were three machines working in the stope. There was one with Porter; that is marked as number 5. Here is another one called Mack, marked on the map as number 6. The third one was here, at the end of this track. (Indicating on map.) (Point marked "8".) Those three places represent the three machines.

"Q. When the machine works and the blast is shot in the evening—on the night shift—the day mucker takes away the muck that has been thrown [51] down by means of the machines, and the discharge of the dynamite on the night shift?

A. Yes, sir.

Q. And the men then who work on the day shift—that is, the machine-men—and the blast that is thrown in the day, the material is taken up by the mucker who goes in there on the night shift?

A. Yes, they have been doing it, I think.

Q. Now, the reason for that, Mr. Cunningham, is

(Testimony of James Cunningham.)

the fact that a good deal of smoke will gather immediately after the firing of the shot, and then you have to wait some little time to find out whether the jar of the explosion has loosened the rock, and whether it would be dangerous to go to that point, and therefore you wait some considerable time before the mucker goes to the point where the rock has been thrown down?

A. Well, the miner goes in first and bars down the loose rock, and he tells the mucker when it is safe for him to come in.

Q. Now, then, when you went in there who was the miner where you went to work mucking?

A. That ground that fell down, I think it was hanging there for about four days.

Q. Hanging there for about four days?

A. Yes, sir.

Q. What do you mean by hanging four days?

A. It was hanging up to the hanging-wall there; it was four days from the last miner had worked there.

Q. And did you observe it when you went in?

A. No, I didn't pay no attention to it.

Q. You didn't look at it at all to see whether it was loose or not? A. No, sir."

Mr. Roper took me in there to work, and I thought it was all right; Mr. Roper said nothing to me at all. Me and him put in the switch.

"Q. You and he put in that switch. What do you mean by saying four days; do you mean to say that the roof of the stope had been loose four days, or do

(Testimony of James Cunningham.)

you mean to say that the blast which had been fired in that particular stope was four days prior to the time you went in?

A. I mean to say that the blast had been four days.

Q. That is all; you know nothing, and heard nothing and saw nothing that would indicate that the roof of the stope there was loose at all?

A. No, sir.

Q. Now that which fell down was a loose sheet wasn't it—it didn't fall down in separate little particles, but was just one solid sheet that fell from the top or roof of the stope?

A. Well, it fell so sudden I could not tell what way." [52]

My partner would be about ten or twelve feet from me, the car was atween me and him. He was not hurt at all. Mr. Porter was passing by, right about there somewhere. (Indicating on map.) Closer over to the pillar somewhere. (Indicating.) (The place indicated by the witness is marked with the figure "9" on Plaintiff's Exhibit No. 1). He was at that point when he was injured. Me and him was hurt. At the time that we were hurt Mr. Porter was about twelve or fourteen feet from me.

At Rock Springs I worked pretty near three years; I got three dollars a day when I was firing boilers; out of that I paid my own board and lodging. I worked pretty near all that time.

"I received \$5.00 a day in Goldfield mucking, and received \$4.00 a day in the Tonopah mines."

In the Keane Wonder Mine I received four dol-

(Testimony of James Cunningham.)

lars per day. Our board was taken out of that. They had their own boarding-house. There is no means otherwise for a man to stop, except to be lodged and boarded at the mine, being no town, and away off by itself.

“Q. Now, when you worked all these years, were you in perfect health?”

“A. Yes, sir.” “And was a strong active man of good habits and willing to work at any time when I could find employment. I tried once to work since I was hurt in the Keane Wonder.”

I worked two shifts and one hour. That is the only time that I have made any effort since I was hurt, to get employment. I have been sick, not feeling good all the time, and I didn't look for any other occupations; I thought it was impossible for me to get any work.

“Q. Now, the bones where you were injured, in this compound fracture, as testified to by your surgeon, have knitted solid and compact to-day?”

A. I don't know. Yes, I can walk. I don't know just how much my left leg is short. I tried to have a shoe fixed with a heavy sole and tall heel,—I can walk better without it.

In the working of the stope where I was at work, there was three machine-men there, and Frank Porter, and another man they called Old Mack. The miners were the machine-men. I don't remember the other one's name. The [53] miner that ran a machine would drill the holes and put in the dynamite and attach the fuse. After he had

(Testimony of James Cunningham.)

done that he would holler fire, and all get out of the stope. Before he fired the dynamite what would he do. He would remove his machine back to a place of safety.

Q. After he fired the shot what became of the miner? A. They all got to a safe place.

Q. But it was the duty of the mucker to muck it out for a place to put the machine back, wasn't it?

A. Oh, just as the thing would happen; whatever orders the foreman would give would be done.

Q. Then that blast would take place then. If that was in the night shift, the morning shift of muckers would go down and remove the muck before any machine was placed in there again?

A. Well, if it would happen that way; the foreman would send a miner there first to bore down the loose rock, and inspect the roof.

Q. He would send a miner—who do you mean by miner?

A. Some one hired as a miner, and working as a machine-man, some one that was using powder. "Sometimes it would not take long to get the machine back there and the machine-man could make the place himself for to put his machine; just throw a little dirt out of the way and get his machine in there."

Q. But the machine had to be blocked up, certain hose had to be attached to the machine for air or force, so the muck had all to be taken out before he could put his machine back?

A. No, he could have that hose on there, and the

(Testimony of James Cunningham.)

machine in there, and the muck there too.

Q. And the muck there too? A. Yes.

Q. Without removing it at all?

A. Just remove enough for to leave room for to get his machine in.

Q. He would have to go over the muck to get his machine in?

A. Yes, he would have to go over the muck.

Q. Was it not the usual custom for the mucker to go in and clean all the muck out before the machine is put back there at all?

A. No, it ain't.

Q. Well, wasn't that the custom at the Keane Wonder mine?

A. Not always that I know of.

“Q. Who were you working for, behind what machine were you working as mucker?

A. “I wasn't for any machine in particular. I was closer to Old Mack than I was to anyone else on that day.”

Q. Well, the night shift was cleaning away the muck that had been created by the machine of the [54] day shift?

A. Not always; when them four men would go on shift, the foreman would go there with them, either that, or he would send a miner, and sometimes he would bore down that loose rock himself and see that the place was what he thought safe, before we would go in there to work. That is what they were doing. That is what they did in all other mines that I worked in.

(Testimony of James Cunningham.)

I had no conversation with anybody about whether it was safe or not to work there. When the foreman sent me in there I thought it was all right. No one told me anything about it, one way or another. Mr. Roper worked with me in putting down this switch. The nearest machine was Old Mack,—about fifteen feet from me. At the time the top of the roof of the stope fell down I was just throwing a shovelful of dirt into the car. I was working loading a car.

“Q. Were there any candles at that mine other than what you miners carried with you?”

“A. No, sir, not that I know of.”

“Q. There wasn’t a string of candles put in at any point there down the line? “A. No, sir.”

“A. I was caught so quick there was no chance to get away; it just fell like a flash of lightning.

Q. You were standing up at the time?

A. I was just throwing a shovelful of rock in the car.

Q. Did you have any warning, or hear any noise, or know anything about it, until it occurred?

A. No, sir.

Q. During the time that you were working there, did you ever make any request for any timbers, or anything to be done by your employers in the way of protecting the mine? A. No, sir.”

“Q. You never saw anything that would require you to make any such request, did you?

“A. Well, the man that is mucking—the foreman would not ask him about anything and he would not

(Testimony of James Cunningham.)

listen if you would tell him anyhow." I didn't notice whether any injury was done to the car that I was throwing ore into. I was about three or four feet from the car. I don't know how many pillars were left to protect the roof.

"Q. Do you know the distance from any one pillar to another pillar?

A. Well, I could give an opinion.

Q. Well, do so. A. In places—

Q. Well, I mean at the point where the actual caving took place.

A. Well, from that to the pillar across on the other side, it would be about sixty [55] feet." And then from where the chute was up to where Mr. Porter was working, it would be about eighty feet. Some pillars was bigger than others.

"Well, I said that pillar from where I was hurt over to the pillar on the opposite side, about sixty feet; that wasn't a round pillar; it was a long pillar; it would be about fifteen feet long, and I don't know what the length would be."

That pillar, not being exactly round, was fifteen feet one way, and the distance through the other way would be about six or seven feet.

MR. MOREHOUSE.—Q. "Well, now, I will ask you plainly, isn't it a fact that there were three pillars, and that this caving took place so that it fell down between these three pillars, which were very close together?

A. Oh, it is quite a distance between them pillars."

(Testimony of James Cunningham.)

Where Mack was working it was a block of ground, constituting a pillar in itself. I was hurt pretty close to where Mack was; I was about fifteen feet from where he was. There was a block of unworked ground where Mack was working with the machine; all of that unworked ground was a pillar.

Q. And it held the entire roof up, because there was nothing until that was worked out, that would be possible for the roof to fall down?

A. No, it could not fall down, it would be taken down.

Q. It could not fall down until you had taken the ore body out? A. No.

Q. At the point where you were hurt the ore body had been taken out, hadn't it?

A. There was five or six feet of ore sticking up to the hanging-wall.

“Q. Yes, five or six feet of ore sticking up to the hanging-wall?”

“A. Yes, five or six feet of ore sticking up to the hanging-wall?”

“Q. But where you were standing throwing rock into the car was all worked out?”

“A. It could not have been worked out, Mack was working there close with that machine. It was worked out where I was standing except for the ore sticking up to the hanging-wall.”

Q. Now that was worked out at that point, and at that point were there not three pillars, very near by.

A. No, not that I know of. There was a pillar close to where Mr. Porter was.

(Testimony of James Cunningham.)

“Q. Now, from that point where Mack was working, how far was it to the first pillar nearest to you, which had been left in the territory that had been worked out?

A. It would be ten or twelve feet.

Q. Now, then, [56] that pillar would be how far away from where Mack was working?

A. Oh, it would be over twenty feet, I guess.”

From where Mack was working to the first pillar from him would be twenty feet, and from that pillar to me would be ten or twelve feet; there was a pillar about sixty feet away from it.

“Q. Weren’t there three near by, not over fifteen or twenty feet apart, running in a sort of a triangle from one point to the other, in the three pillars?

A. Not the way it looks to me.

Q. Well, I don’t care how it looks to you, I want to know whether it is a fact or not?

A. Well, I am stating to you as clear as I can what I know.

Q. Do you really know very much about this underground place where you were at work?

A. No, I don’t.

“Where old Mack was working was a long pillar and it was caving down all the time. They sometimes put a Waugh machine on there and would break ore from these pillars.”

This man that I don’t know his name now whether he worked that day on a pillar or not, I don’t know, but he was working the day before on it, and broke some ore out of the pillar.

(Testimony of James Cunningham.)

The COURT.—“Q. Do you mean to say that five or six feet was the ore above you that fell down?”

“A. Yes, your Honor.”

At the point where I was hurt, I think the stope would be about twenty-five feet, from wall to wall. I never measured it or saw it measured. You could see ore in the top of the stope.

“The ledge is almost perpendicular—the hanging-wall right above your head. The ore that fell down was five or six feet of ore that wasn’t taken down from the hanging wall.”

Redirect Examination by Mr. MILLER.

The ore at the point on the hanging-wall, over where I was working at the time I was injured, was a kind of quartz—the color I could not just describe to you. It was a kind of a gray colored quartz. The schist hanging-wall was a dark color; you could easy see it was waste, though.

“By perpendicular vein I mean a flat vein with a hanging-wall being the roof of the stope.” [57]

“Q. Calling your attention to this map, Mr. Cunningham, and the figure 6, where you have stated the machine-man Mack was working; and the figure 9, where you say Mr. Porter was at the time of the falling of the rock, will you indicate which is the pillar you stated was about sixty feet away?”

A. This one, I believe. (Indicating on Plaintiff’s Exhibit No. 1.)

Q. I will make that 10. (Marking point on map.)

Q. Will you indicate on here the pillar which you

(Testimony of James Cunningham.)

described as being about fifteen feet long, and six or seven feet wide?

A. That would be this pillar.

Q. That is the one you mean by the figure 10?

A. Yes, sir.

Q. Now, there is a figure 2 on this map, indicating the place where you were mucking in the morning of December 9th? A. Yes.

Q. That was on this same pillar, number 10?

A. On the same pillar.

Q. Calling your attention to the map, and the marks here with the word "Chute," I will ask you if that was the chute into which you were shovelling ore in the morning of December 9th. A. Yes, sir.

Mr. MILLER.—I will mark that number 11. (Marks the point on Plaintiff's Exhibit No. 1.)

Q. Calling your attention to this other mark, and the word "Chute," I will ask you if that was the chute into which you were running the cars in the afternoon? A. Yes, sir.

Q. That I will mark 12. (Marking point on map.) I will ask you to state, Mr. Cunningham, whether there was any pillar at all between the place where you were injured and the pillar marked number 10, where you mucked in the morning?

A. No, there was no pillar.

Q. I will ask you to state whether there were any stulls or timbers to support the hanging-wall of the stope between the place where you were injured, and the place where you were mucking in the morning.

A. No timber outside the chute—them two chutes.

(Testimony of James Cunningham.)

Q. None except the chute?

A. None except the chute.

Q. Did the timbers of the chute reach to the hanging-wall? A. Yes.

Q. Mr. Cunningham, you have stated that the stope was a good deal larger than this room, will you state approximately how large that whole stope is, or was at that time?

A. Well, to walk right around it as it is there, I think it would be about six hundred feet." [58]

Recross-examination by Mr. MOREHOUSE.

Q. "I understand you to say, Mr. Cunningham, that between the pillar where you were at work, or near where you were at work, and the chute, there were no other pillars?

A. I didn't understand that.

Q. That is, the chute timbers ran clean up to the hanging-wall? A. Yes.

Q. How long were those chute timbers, do you know?

A. Well, where the chutes was they would be—oh, I think about ten feet.

Q. About ten feet. That is all."

Mr. MILLER.—Q. "Do you know, Mr. Cunningham, where the top of that chute was, whether the top of the chute was at the hanging-wall on that level, or whether it ran up to another level—do you know? A. No."

Mr. JAMES CUNNINGHAM, recalled for further direct examination, by Mr. MILLER testified as follows:

(Testimony of James Cunningham.)

The property of the Keane Wonder Mining Company is out of Rhyolite; it was known as the Keane Wonder Mine, in Rhyolite, Nevada. It was about eighteen miles by the trail; and I believe it was twenty-six from the road, from Rhyolite.

“Q. Do you know of any other property of the Keane Wonder Mining Company besides the Keane Wonder Mine?

A. Yes, they got real estate in Goldfield, in the name of the Keane Wonder Mining Company.

Q. What State? A. State of Nevada.

Cross-examination by Mr. JARMAN.

Mr. JARMAN.—Q. “Mr. Cunningham, where is the company’s property where you were at work, in what state is it situated?

A. It is in California.

Q. Inyo County, California, is it not?

A. Yes, sir.

Q. Do you know that since the time of your injury the Company has continued its operations at the same place?

A. Well, I expect it has.

Q. You know as a fact, do you not, that they are still working at that mine at the present moment?

A. Yes, sir.”

[Testimony of Dr. E. A. Wheeler, for Plaintiff.]

Dr. E. A. WHEELER, called as a witness on behalf of plaintiff, after being sworn, testified as follows:

(Testimony of Dr. E. A. Wheeler.)

Direct Examination by Mr. MILLER.

My name is E. A. Wheeler. I reside in Goldfield, Nevada.

(It is [59] stipulated by and between the attorneys that Doctor Wheeler is a practicing physician and surgeon, regularly licensed to practice in the State of Nevada, and competent in his profession.)

I know James Cunningham, the plaintiff in this case. I first became acquainted with him on December 9th, 1911. He was injured at the Keane Wonder Mine, in Inyo County, California; I was called down from Goldfield, left the evening before, and got down there about 4 o'clock in the morning. He was lying in a bunk-house, and had a compound fracture of the lower left leg, above the ankle. There were contusions over his body—he was bruised up considerably. I attended him professionally at that time. We put him in an automobile and took him to Goldfield, and operated on him the next afternoon, the afternoon of the 10th. The operation was sawing off the crushed bones and wiring them together—shortening the leg about an inch and a half. There were four operations on the leg within the next two or three months. The second operation was removing some shattered bone. I don't remember the exact date. It was within two or three months, anyway. The third operation was something of the same nature, and also the fourth. The leg was not shortened any more by reason of these subsequent operations. I attended him professionally for about a year, from the 10th of December, 1911, to the first

(Testimony of Dr. E. A. Wheeler.)

of the year, 1913. I gave Mr. Cunningham no other than general treatment in the hospital in a case of that sort where a man is run down, as he naturally would be,—other than as I have testified. There was a great deal of suppuration,—the leg was crushed to a pulp. “He had a very serious time and the bones were all crushed out and very few muscles were left, the wound was very dirty and it had had very little attention. I dressed it as best I could—wrapped the leg and strapped him in the automobile and took him to the hospital. I have been paid \$100 on account for my services.” My services were worth a thousand dollars. A man injured as Mr. Cunningham was, would suffer pain, to a very great extent, for several months. I did notice indications of suffering in Mr. Cunningham, loss of flesh, and indications of pain, requiring something to relieve the pain, so he could get some [60] rest. “Those cases are very painful usually.”

Cross-examination by Mr. MOREHOUSE.

I should say that the last time I saw Mr. Cunningham, professionally, was about a year from the time he was injured. At that time the wounds were healed up, and he was able to walk on the leg. He was in as good condition as I thought he would be at any time. That is, he was able to do a fair amount of work; I don't think he was able to work in the mine, do the heavy work around a mine—he was not totally disabled. There will be some disability; he will have to wear a thick shoe, something to lengthen the leg, and he will not be able to do as much work

(Testimony of Dr. E. A. Wheeler.)

as he would have been otherwise, because of the shortening of the leg.

I went to the Keane Wonder Mine at the request of Mr. Wilson, the superintendent and manager of the mine. I was requested to take Mr. Cunningham to Goldfield, and do what I thought best, and the bills would be paid. This request came from both Mr. Keith and Mr. Wilson. "Both bones were crushed and a part of the bone protruded through the flesh causing an open wound. I was assisted in the operation by Doctor Dunham and Doctor Turner." Keane Wonder Mining Company paid my assistants. St. Mary's Hospital is first-class; the services are satisfactory, and he was given every care that would be given to anybody. This was done at the request of the Keane Wonder Mining Company.

"Q. Now, the plaintiff here is not wholly disabled from engaging in any occupation, is he? A. No."

There are classes of occupations which, if he saw fit to seek and should obtain, he could perform. There were no internal injuries, or anything that would go to his general health in the future.

"Q. Is there anything in this injury which will go to his general health in the future? A. I don't think so.

"Q. You think not? A. No."

[Testimony of Matt Dropulich, for Plaintiff.]

Mr. MATT DROPULICH, called as a witness on behalf of plaintiff, after being sworn testified as follows: [61]

(Testimony of Matt Dropulich.)

Direct Examination by Mr. MILLER.

My name is Matt Dropulich. I reside in Goldfield, State of Nevada. I have been a miner for about five years. I am a mucker and miner; I am called a timberman, too. I have done no other work in a mine. I first began to work in a mine in Park City, Utah. Then I went to Goldfield, Nevada,—Consolidated Company, Claremont Shaft. I done mucking there. Next I took in Keane Wonder Mine. I don't remember what time of year I began work there. I don't remember the year. The first time I worked there I worked eleven shifts. I was mucking there too. I worked there a second time, about three months, mucking. I worked in Mason, in the Blue Stone Mine, mucking, and helping timberman. I was working next time to the Goldfield, in the Grizzly Bear Shaft. I was mucking and running a machine, and do sometimes timberman too. I was running a machine drill, on drift and stope, and rest too, all kinds of work with machine there. I was not working in the Keane Wonder Mine at the time this man was hurt, I was in Rhyolite the day he got hurt. I was working in the Keane Wonder Mine about ten days before this fellow got hurt. I worked there afterwards,—about a month afterwards. I worked in the stope where the men were hurt, before and after. The space between the floor of the stope and the roof is about from fifteen to twenty foot.

Mr. MILLER.—Q. “How was the roof of that stope supported, if you know?”

A. Well, the roof, I want to tell you that place

(Testimony of Matt Dropulich.)

ain't exactly—I can't tell you whether the roof was solid or soft or loose, I can't tell you that exactly.

Q. Well, was there anything to support the roof, to keep it from falling? A. You mean timbers?

Q. Yes, or anything else?

A. What I can remember, I didn't see timbers in that stope; I cannot remember, I would not tell you exactly about that.

Q. Was there anything else there to support the roof at that point?

A. There was some kind of pillars." Foreman, what you call Mr. Roper, every morning he come to you and tell you place what you got to do, and muck in; then after you have that lot mucked, then he tell you another place to go, and then into another place. I never saw any printed rules posted up anywhere. [62].

"Q. Do you know what a sounding bar is?

A. Those pinch-bars what you got to pick the roof, you mean?

Q. Yes.

A. That is not a mucker's business; that is a miner's business; I never was work with that, I didn't see it either."

"I went back to the Keane Wonder Mine a day after these fellows got hurt."

Cross-examination by Mr. MOREHOUSE.

After dynamite has been dicharged, then the mucker goes down there to take away the rock or ore, whatever it is, that is broken down.

{Testimony of Matt Dropulich.}

“Q. Well, now, see if I can make it plain to you. I will suppose I am running the machine, and drilling the holes in the wall, or drift, or whatever it may be, and I have put in the shots—I go away, don’t I?

A. Sure.

Q. And after those shots have been fired, who, of the people that work in the mine go in there first, after the firing of those shots?

A. Miner—miner goes the other place.”

Miner got to go to the place and see if there is any loose rock. Mucker goes after; mucker have no right to pick it down; it is all the miner’s business. Muckers have no business to take a pinch-bar and strike the surface, and find out whether the rock is loose, after the firing of a shot; mucker’s business is to muck him out; that is all what he has got to do. He goes in and cleans it all up, so after he has cleaned it up and hauled it away, the machine may be put up against the face of the drift to drill other holes.

“Q. Now, you say the first workman that goes into the mine after the shots have been fired is a miner?

A. Miner—work all together; miners come first to the place, the other place.

Q. What does the miner do then?

A. Oh, he take a pick, or something, machine or something just to rap the roof to see whether it is loose or not.

Q. That is all a miner does in the mine?

A. When he go to the place, the other place, then, to see whether loose or not, and then drill them out.”

Mucker got no business at all except mucking, that is all. A mucker is given a pick and shovel and

(Testimony of Matt Dropulich.)

hammer to break boulders sometimes.

I can't tell you what level it was where this man was hurt. I can't tell how many levels there are in that mine. I don't know whether this [63] is the first, second, third, fourth, or fifth level, I was working all the time on one level. I didn't ask nobody what level I was working on. I went in the next day after this man was hurt; I saw that the roof had fallen down. Three men mucked one day, and didn't get out what fell down; I don't say whether it is there yet or not. There were muckers there taking this out where it fell down from the roof.

"Q. What was it fell down from the roof?

A. Ore.

Q. Ore? A. Yes."

There were some pillars, but not very much pillars. I know Mr. Porter. He was mining there, he was running the machine. I was mucking behind Mr. Porter when he was working there; he was working in a stope at that time. Porter was a machine-man. Working up against the face of that wall or drift, there would be a machine, and this machine would bore holes into the face, and those would be filled with dynamite. And then later a fuse would be fired, and that would break and explode, and break down the rock. Then the mucker came in and removed all the rock. That was his business. All along in this stope there was a track for running cars, and some place none. This car-track ran away down here to the chute.

"Q. This chute was an upraise from a lower level,

(Testimony of Matt Dropulich.)

wasn't it? A. Something like that.

Q. And then the car would run out to this chute, and the mucker would run his car out there, and tip it, and let the rock out of the car fall down this chute to another level . . . the ore went to another level?

A. Why, sure.

When that ore reached the other level it was carried along a drift to the rock-crusher. From the rock-crusher it ran over a tram-way to the mill.

There was a switch where Mr. Cunningham was working where he was hurt. The work was all on this side of the track.

“Q. A long time before it was all worked out, and nothing standing there but the pillars, was the only ore there, and they were not working in any of those pillars?”

A. Those pillars, nobody was working there that time.”

I never worked on the other side of the track. I saw fellows work on the other side of the track. I know the point where the top of the stope [64] fell down on the floor of the stope, but I can't tell you anything about the map. I can't tell you all that,—about men working in the place where the mine had been worked out, and there was nothing but pillars standing. Oh, some fellows was working the other side the track sometimes. I see some fellows, but I can't tell you, because I don't know which side you mean. I understand what flat mean.

Mr. MOREHOUSE.—Q. “I will put the map on and use it at present as a diagram; later on I shall

(Testimony of Matt Dropulich.)

prove the map, and introduce it." (The map is placed upon the board).

Mr. MILLER.—"Are you going to introduce that map in evidence?"

Mr. MOREHOUSE.—"I shall later, when I have proved the map; I am going to use it with this witness for the purpose of illustration; later on I am going to prove the map.

Q. Can you see from there this line drawn along here? A. Yes, I can see.

Q. Now, when you were working in the mine—do you understand that at all, this map?

A. No, I can't tell you nothing about the map.

Q. Well, we intend this line that we have drawn here—you see how this is curved around in this shape—to indicate the face of the drift where you were drilling against, and mucking from in that mine—do you understand that?

A. No, I didn't understand that.

Q. We have drawn this line along here to represent the railway track, and this is to represent a switch; do you understand that.

A. No, I can't understand that.

Q. You can't understand it at all?

A. I can't understand the map at all."

"Q. There were several stopes there on this level, were there? A. Yes.

Q. Every man you know of working in these stopes was working on the ore-body? A. Yes.

Q. In the particular stope I speak of, where you were at work, where Mr. Cunningham had been at

(Testimony of Matt Dropulich.)

work, and where Mr. Porter had been at work, you were all working on the ore-body?

A. I know the place where Cunningham and Porter was working, but that time they got hurt I was not there.

Q. You know the place where they had been at work?

A. I know the place, but I can't tell you by the map.

Q. You know the place where they were working—they were working on ore?

A. Mr. [65] Cunningham was working in the ore-body; Mr. Porter, I don't know whether working in the ore or not." I have been mucking altogether, about five years.

"Q. You understand mucking thoroughly now, don't you? A. Well, I understand mucking, yes.

Q. Very well, I will put it that way.

A. I understand that all right.

Q. Then you understand mucking very well. While you were working underground did you ever learn anything about mining?

A. Learn any about what?

Q. About mining; do you know anything about mining?

A. I know anything about work, but I don't know anything about mine.

Q. You would know a mine, I suppose, if you saw it, would you? A. If I saw it?

Q. Yes, if you saw a mine you would know it?

A. Well, nobody could know. You see that posi-

(Testimony of Matt Dropulich.)

tion is pretty hard to tell, if it is a lot loose you would know something, but if it is a little loose nobody would know."

"Q. Do you know ore when you see it from waste?

A. Why, sure."

"Q. I am talking about the Keane Wonder mine?

A. He was ore.

Q. And we are not going to take up any other mine now for the present. You know where the ore body was in the Keane Wonder Mine, where you were at work? A. Where I was working he was ore.

Q. Now, do you know whether the ore was on both sides of the track over which you ran your car, or not?

A. Oh, I can't tell you everything where I was working; I got everything that was ore where I was running car.

Q. Did you work on both sides of the track, or on one side?

A. I was working both sides of track, but I don't know which one you mean.

Q. How many tracks are there in that?

A. Oh, I can't tell you that.

Q. Now, there was only one track that you were using, was there?

A. Oh, I was working more than one, sir.

Mr. MOREHOUSE.—Well, I give it up. I give it up that he don't know anything."

Redirect Examination.

Mr. MILLER.—Q. "Mr. Dropulich, you stated in answer to Senator Morehouse that there were some

(Testimony of Matt Dropulich.)

pillars in the stopes—pillars of ore supporting the roof?

A. He was some pillars, yes; pillars of ore, yes; I am sure that way, but I can't tell you how many pillars there was. [66]

Q. Now, did you ever work on any of those pillars, muck from them?

A. You mean close to pillars?

Q. No, on the pillars themselves; did you ever muck from the machine man who had shot the pillars? A. Yes, I do."

"Q. Now, this track we have been talking about in that stope there, it runs in various directions, doesn't it—it is not straight, is it?

A. Oh, some places crooked, some places it straight."

Mr. MOREHOUSE.—"Q. When you worked in the Goldfield Consolidated, in the Claremont Shaft, what tools were given you to work with?"

A. Shovel and pick and cars, and hammer."

"Q. Anything else?" "A. Nothing else."

Recross-examination by Mr. MOREHOUSE.

"A. On the Grizzly Bear I was working about seven months running a machine there, mucking, helping timberman sometimes.

Q. You ran a machine on the Grizzly Bear?

A. Yes.

Q. And you were mucking also in the Grizzly Bear, did you say? A. Yes, I was mucking there too.

Q. Were you ever furnished with a bar for the purpose of drumming?

(Testimony of Matt Dropulich.)

A. You see on the Grizzly Bear the ledge is not very big; you no need bar; if you see some loose, you can pick with a pick. Since I was a miner there, I never use a bar there at all, cause this ledge is too short, and you can reach it with your hand to the roof every place."

MATT DROPULICH, recalled by plaintiff for further direct examination, testified as follows:

Mr. MILLER.—"I desire to offer in evidence that part of the California statute which is set up in paragraph four of the complaint; the act relating to liability of employers for injuries or death sustained by their employees, providing for compensation for the accidental injury of the employees, establishing an industrial accident board, making appropriation therefor, defining its powers, and providing for a review of its awards, approved April 8th, 1911, section 1 and section 2 of the act, which read as follows:

The COURT.—"Well, is there any objection?

Mr. JARMAN.—"We object unless they offer the entire act. We have no objection, if counsel will offer in evidence the act in its entirety." [67]

Mr. MILLER.—"We do not admit that any part of the act applies to the case, subsequent to the first three sections."

Mr. MOREHOUSE.—We will want the first seven sections, and section 10 to be reviewed by the Court.

Mr. MILLER.—You can offer that yourself.

Mr. MOREHOUSE.—I may be in error, but I understand that this Court will take judicial notice of the whole act, and I am prepared to present au-

(Testimony of Matt Dropulich.)

thorities that the Federal Court so holds.

Mr. MILLER.—Our contention in that respect is that if a person wants to avail himself of the statute of another State, he must plead it.

(The jury is excused at this time while counsel argue the objection made by defendant to the offer by plaintiff of sections 1 and 2 of the California Statute.)

Mr. MILLER.—For the sake of having the record clear, I would like to have the entry made that the defendant admits that it did not come under the provisions of the Employers' Liability Act.

Mr. MOREHOUSE.—Oh, no.

Mr. MILLER.—Well, state it in your own way.

Mr. JARMAN.—Yes, that is the truth.

Mr. MOREHOUSE.—That we have not given the notice as required by section 5 of the act, and that we have not complied with the Employers' Liability Act of California.

The COURT.—How does this Court know, if it cannot take judicial knowledge of section 5 or if it is not introduced in evidence, how is the Court or jury to know that you are required to come under the provisions of the Act? It seems to me it is utterly unnecessary if only these two sections go in.

Mr. MILLER.—As I understand it, the defense has offered the rest of the Act?

The COURT.—No, the defendant simply says I must consider the act, whether it is offered or not, as I understand it, that I must take judicial knowledge of that, just as I would a statute of this State.

(Testimony of Matt Dropulich.)

Mr. MOREHOUSE.—Exactly.

(Argument.) [68]

Mr. MILLER.—We object further to the admission of these other parts of the Employers' Liability Act, for the reason that they do not apply, to this case in any way whatever, that the first two sections are complete in themselves; and it being admitted that this defendant did not accept the provisions of this act, there can be no application of sections 3, 4 and so forth, to it. We will submit it if your Honor please."

The COURT.—"Well, if I thought there was any question about the matter, I would permit the defendant to amend, and set up these sections, if it wished to do so; but in the absence of any authority on your side, I shall simply follow my first impressions, and take judicial notice of the act; and if before the case is disposed of, anything occurs that leads me to change my opinion, I feel, under the circumstances, the defendant should be permitted to amend, and set up the statute, if it is necessary in order to make out its defense."

Mr. MILLER.—"Then your Honor's ruling is that the whole act goes in?"

The COURT.—"I will simply take judicial notice of it, and if defendant wishes to offer the balance of the act, it may do so, and that portion of it will be admitted which is relevant."

[Testimony of Louis Guerra, for Plaintiff.]

MR. LOUIS GUERRA, called as a witness on behalf of plaintiff, sworn, testified as follows:

Direct Examination by Mr. MILLER.

My name is Louis Guerra. I reside in Goldfield, Esmeralda County, Nevada. I have been working in the mines for eleven years, as a mucker and cageman. In the month of December, 1911, I was working at the Keane Wonder Mine, as a mucker. On the afternoon of the day Mr. Cunningham was injured, I was working about twenty or twenty-five feet from where he was injured. What first called my attention to Mr. Cunningham's being injured was the cave.

"Q. In what position or condition was Mr. Cunningham when you first saw him after the cave?

A. He was covered in rock about up to his knees, lying on his side.

Q. Who helped dig Mr. Cunningham out of the rock, if you know?

A. I did, and my partner." [69]

After Mr. Cunningham was dug out of the rock, I went after water for him where I was working. After that I was digging him out with my partner—caring for him.

"Q. Did Mr. Cunningham give any signs, or say anything, or do anything that indicated that he was suffering any pain at that time?"

"A. He was not speaking."

"Q. What was it that fell and caved on him?"

"A. Waste—mixture of waste and metal."

(Testimony of Louis Guerra.)

About sixty cars of waste—mixture of waste and metal—fell and caved on him, as near as I can tell or estimate it. I had been working maybe two or three days.

“Q. Were there any stulls or timbers supporting the hanging-wall at or near where that rock caved from?” “A. No, sir, there wasn’t.”

I was employed by Mr. Roper.

Cross-examination by Mr. MOREHOUSE.

When Mr. Roper employed me as a mucker, he said it was all right, to go to work. He did not give me any tools, but in the mine I found a pick, shovel and a hammer, also a car to haul out the metal and rock. There was no iron bar. He did not give me any moils, or instruments of that kind. I had only been working there two or three days when this injury to Mr. Cunningham occurred. I had been a miner about eleven or twelve years. I was working in this mine on the 9th of December, 1911, in the stope, I don’t know the number. I didn’t see whether the stopes were numbered in this mine. I do not know what level I was working on. My partner, a Mexican named Jose Vanteos, and I were working about twenty-five feet from where Mr. Cunningham was.

“Q. How many pillars were there near where Mr. Cunningham was hurt? A. Two pillars.

Q. Were they large or small?

A. Oh, regular size.

Q. Regular size. How far from the pillars was Mr. Cunningham Hurt?

(Testimony of Louis Guerra.)

A. About twenty-five or thirty feet.

Q. Was there a car-track near there?

A. A car-track passed in the middle.

Q. That car-track passed in the middle, that is, between the pillars? A. Yes, sir.

Q. Where the waste rock with mineral fell down, was that roof of the stope or hanging-wall protected with pillars?

A. The pillars were there, but they didn't [70] stop the cave."

"Q. How far from the pillars did the cave come down?" A. About twenty-five or thirty feet."

I want you to understand that from the floor of the stope to the roof of the stope was about twenty feet.

"Q. Now, then, I asked the question how far these two pillars that he spoke of were apart from each other, and the answer is about twenty feet apart, I want to know if that is correct?

"A. About twenty-five or thirty feet."

There were only these two pillars. Forty or fifty feet from where I was working there were others.

Q. Now, ask him if he recollects distinctly or not, if there was not right where Mr. Cunningham was injured three pillars running in a sort of a triangle, fifteen or twenty feet apart each of them, instead of two? A. No, sir.

I do not know where the car was that Mr. Cunningham was filling with ore at the time of the accident. I saw a car there.

"Q. So immediately following the accident you

(Testimony of Louis Guerra.)

saw a car, did you, standing on the track?

A. Yes, sir.

Q. How far was that car from the pillar?

A. Ten or twelve feet."

[Testimony of A. Perez, for Plaintiff.]

Mr. A. PEREZ, called as a witness on behalf of plaintiff, after being sworn, testified as follows:

Direct Examination by Mr. MILLER.

My name is A. Perez. I reside in Goldfield for the present. For the present my occupation is a common laborer. In the month of December, 1911, I was working in the Keane Wonder Mine, as a mucker. Before that I had worked in mines at times, not steady, just probably three or four months, and then quit for a while, and come back again. I have been working in mines off and on since 1902. I always worked as a mucker. I had gone to working on the 19th day of September, 1911, in the Keane Wonder Mine and worked there all the time from then up to the time Mr. Cunningham was hurt and after. On the day he was injured, the 9th of December, 1911, I was working in the only stope in the mine.

"Q. How far were you working, how far from where Mr. Cunningham was hurt? [71]

A. Well, supposed to be the length of the track, the length of a rail.

Q. Length of a rail, and that is about how many feet, as near as you can tell?

A. Well, I think that rail was fourteen feet long.

Q. And you were mucking at that time, you say?

(Testimony of A. Perez.)

A. How is that?

Q. What were you doing at that particular time when the rock fell on him?

A. Well, I was shovelling in the car.

Q. Were you between Mr. Cunningham and the chute, or the other side from Mr. Cunningham?

A. No, the other side, Mr. Cunningham was between me and the chute."

What first called my attention to Mr. Cunningham's being injured was a crash which sounded to me like a blast. That concussion put out my light, so I struck another match, lighted a candle, and went a little ways to the clear space, because it was awful dusty there, I could see nothing. The next thing I heard Mr. Cunningham asking for mercy and Porter said he was "Matto." I don't know the meaning of the word "matto."

"A. Then I went and find Mr. Cunningham, something in this position (illustrating), with his legs wedged among rocks.

Q. And what happened after that time?

A. Then another Mexican come along, and we throw out big rocks, and went to helping Mr. Porter.

Q. And what happened then?

A. Then other fellows come around with drills, and we threw off some big rock that was hold Mr. Porter against the pillar."

Well, we took them out of the mine and we met some helper from the surface; then we take cots and took him down to the mill on our shoulders; then Mr.

(Testimony of A. Perez.)

Keith gave orders to clean and wash them, and Mr. Keith or Mr. Wilson brought some clothing from the commissary to put them on; after we got through Mr. Keith picked up two of the bunch and told them to stay there waiting for the auto, and sent the rest of us up to the mine. Mr. Cunningham's leg was broken, one piece of the bone sticking outside.

“Q. And did you notice any other injuries upon his person, of any kind? Why, some kind, like bruises, and red spots around the arms or wrists.

Q. Were there any timbers or stulls supporting the hanging walls at the place, or near where Mr. Cunningham was injured?

A. Well, there were two stulls hanging the *chut* frame, another stull, I think, to the right hand of the switch, a little ways, probably over ten feet, from ten to [72] fifteen feet.

Q. Ten or fifteen feet from where?

A. From the switch.

Q. And the two stulls—

A. (Intg.) And another one, well, about the same distance, from ten to fifteen feet.”

There were no timbers or stulls supporting the hanging wall right at the place where he was injured. I was sent to work at the Keane Wonder Mine by Hummel Brothers Employment Office, Los Angeles, California. When I got to the mine, Mr. Roper send me with another man to work with him. There were no printed rules or regulations stuck up or posted around the mine that I know of. “Mr. Roper gave me no instructions about my work.”

(Testimony of A. Perez.)

Cross-examination by Mr. MOREHOUSE.

I have been a miner and mucker from the 19th of September till the 2d or 3d day of March, 1912. I was in the Keane Wonder Mine from September to March.

“Q. And you were acting mucker as behind what machine?

A. No machine at all; the muck was broke there before we go after the machine.

Q. The muck was already broken before going?

A. Yes.

Q. And you simply went in to remove it?

A. Yes.”

I am familiar with the car-track there and the little switch that ran off from the car-track. Mr. Roper and Mr. Cunningham built this little switch.

“Q. Right at this point, or very near this point where Mr. Roper and Mr. Cunningham laid this little switch, were there any pillars?

A. Well, I suppose that track was shooting between a pillar and a body of ore, after while they cut a pillar there in the far corner.

Q. But I mean at the time that Mr. Cunningham was hurt, wasn't there three pillars, and just between two and the other one, there was a track which ran right in between the pillars at that time?

A. No, there was some pillars, but a little far away.

Q. How far apart were these pillars near the place where the accident occurred?

A. Oh, well, the first pillar was close to the track,

(Testimony of A. Perez.)

and the other pillars were too far away from there.

Q. How far were the other pillars away?

A. Oh, well, I can't say how far.

Q. Well, I know you didn't measure it, but you can give us some idea of the distance.

A. Well, it must be fifty feet, where I was working that [73] morning towards some pillar, close to another pillar.

Q. Now, let me take the nearest pillar to where Mr. Cunningham was at work, how far would that be away?

A. Well, the nearest pillar there was where Mr. Porter got caught.

Q. Where Mr. Porter got caught? A. Yes.

Q. How far was Mr. Porter away from the place where Mr. Cunningham got hurt?

A. Just parallel with the switch.

Q. How?

A. Just parallel with the switch.

Q. I understand it was parallel with the switch, but how far away was it?

A. Well, I don't know exactly how far it was.

Mr. JARMAN.—Give us your best judgment.

A. Well, I am an awful poor guesser about that.

Mr. MOREHOUSE.—Q. Well, was it fifteen feet?

A. Maybe fifteen feet, and maybe more and maybe less.

Q. Now, that would be the first pillar nearest to where Mr. Cunningham was hurt?

A. Yes, that was the nearest.

(Testimony of A. Perez.)

Q. Now, then, how far away would be the next pillar, if you know?

A. Well, there was no more pillars, because they are cut—already cut.”

Q. I am speaking now of those that are cut already.

A. Do you mean backwards, or ahead from us?

Q. Well, I don't know what you mean by backward or ahead. What I am trying to get at is, let us suppose for the sake of argument, that this post is a point where Mr. Cunningham got hurt, how far from Mr. Cunningham was the first pillar, I mean the pillar that was cut out?

A. Well, where I was working in the mine?

Q. I don't know where you were working that morning.

A. About fifty feet distant.

Q. About fifty feet distant was the first pillar to Mr. Cunningham?

A. Yes, that pillar, I think, was the nearest.

“Q. You said something about Mr. Porter being pinned up against a pillar?

A. No, Mr. Porter was caught in the pillar close to the switch where the hanging-wall fell.

Q. How far was that pillar where Mr. Porter was caught from where Mr. Cunningham was hurt?

A. I could not tell exactly.”

That afternoon I had been working in the mine on or about the place where Mr. Cunningham was hurt. Before that I mucked there in straight track, was drifting, something like a drift, all through the stope.

(Testimony of A. Perez.)

I am familiar in the place where I be at work; another part of the stope was worked out for a long time before. [74]

“Q. And they were working along the face of an ore body, were they not?

A. Oh, it was all face there.”

There were three machines working there at that time. Mr. Mack’s machine was the nearest from us, it was just a little ways. All the balance of this stope, except the face of the ore body had been worked out before, that is, to the left hand side of the stope. There was no more hanging-wall working, except at the place where we were working that day.

“Q. There was some hanging ore then on the hanging-wall at the place where you were working that day?

A. Well, there was hanging ore where I work that afternoon.

Q. Where you worked that afternoon?

A. Yes, sir.

Q. And that was how far from where Mr. Cunningham was at work?

A. In the same place.

Q. At the same place. Now, what were you doing when the accident occurred? A. How is that?

Q. What were you doing when the accident occurred to Mr. Cunningham?

A. Oh, I was shovelling in the car.

Q. And what was he doing?

A. Well, he was—when I saw him, he was with his

(Testimony of A. Perez.)

shovel in his hand, some kind of this position, something like that (illustrating).

Q. Well, he was shovelling, too, was he?

A. I guess he was shovelling back of me.

Q. You think he was shovelling back of you?

A. I think he was shovelling there, coarser stuff in the car, and the finer stuff between the ties of the track we lay that afternoon.

Q. He was not working between the irons on the switch, but on the main track itself?

A. He was alongside of the track, I guess.

Q. And he was throwing that into the car?

A. The coarser stuff, he used to shovel in the car, and the finer stuff between the ties, to tamp the ties."

It was the piston machine was breaking ore ahead and this ore would be thrown back from the piston machine and I was taking up this ore and throwing it into the car, to be rolled out to the chute.

After a blast is fired off by the miner or machine-man, if he shoots between half-past seven in the morning and half-past four in the afternoon, then a miner will go back.

"Q. But if he shoots at any other hour, then what does he do? [75]

A. If he shoots at a different time, the night shift will look after it.

Q. What is shooting time?

A. Well, supposing they quit about half-past four, they may shoot probably fifteen minutes after four."

The miner either shoots before or at quitting time.

"Q. If he shoots at quitting time, he goes off shift

(Testimony of A. Perez.)

entirely? A. Yes, sir.

Q. And that muck is left there? A. Yes.

Q. And the next morning he goes in to remove it?

A. Probably the same man.

Q. Probably what man?

A. The same miner that shoot the day before.

Q. A miner is a mucker, is he?

A. He have to go there to see the country.

Q. What would be the use of the mucker, if the miner goes back and mucks himself?

A. I never tell you that.

Q. I know you don't, I am asking you if that is so.

A. The miner goes back to see the country, and if he says it is all right, the mucker go after, and shovel in the car.

Q. The mucker don't go to work until the miner comes and tells him to go?

A. He go at the same time, probably he can do something around till the place is safe to work underneath.

Q. So in all the mines that you have been in, the miner after he has shot, and the muck is lying on the floor of the stope, or whatever you want to call it—

A. (Intg.) No, sir, no such thing. The mucker goes to shovelling some place else."

When I went work as a mucker the first day, just went after and Mr. Roper told me to shovel here.

"Q. Now, what did the miner tell you?

A. Miner?

Q. Yes. A. Nothing.

Q. The foreman is not in there all the time, is he?

(Testimony of A. Perez.)

A. Well, supposed to be.

Q. He is supposed to be in there all the time?

A. Supposed to make his rounds.

Q. I see. This man Roper made his rounds regularly, did he? A. Yes.

Q. And he was foreman? A. Foreman, yes.

Q. Now, during the time you were working in there, did you know of any place where they had not properly protected with pillars or timbers?

A. Well, there were several men working around, one man by the name of Holser—

Q. No, I am not asking you what other men are doing, I am asking you what you saw, yourself?

A. Yes.

Q. Now, wherever they were working, wherever they were mining, wherever they were taking out ore—

A. (Intg.) Several places.

Q. Do you know any place where they were taking out ore that it was not properly timbered or pillared sufficiently to do the work properly and safely?

[76]

A. Well, they were getting ore one, two, three, four, five places.

Q. They were taking out ore at five places?

A. Yes, sir, some of them drilling and some of them mucking at the same time."

Redirect Examination by Mr. MILLER.

I guess the distance between the foot-wall and the hanging-wall at the place where Mr. Cunningham was injured was maybe from fifteen to twenty feet, where

(Testimony of A. Perez.)

the hanging-wall fell. When Mr. Cunningham and I stood there working on the 9th of December, we were standing on loose muck; the foot-wall was on loose muck where the track was laid. The loose muck was lying on the foot-wall and the hanging-wall was above.

“Q. Under whose immediate order was Mr. Porter, the machine-man?

A. No, the machine-man had no orders to give to us at all, because he goes on shift, and he has to drill his rounds.

Q. And then he went off shift?

A. Yes, and then got off shift.”

[Testimony of Frank Porter, for Plaintiff.]

FRANK PORTER, called as a witness on behalf of plaintiff, sworn, testified as follows:

Direct Examination by Mr. MILLER.

I understood what the clerk said. My name is Frank Porter. I live in Goldfield—in Tonopah, both, Nevada. I have been mining four or five years, I think. In that time I have done different kinds of work; I used to do timbering, run machine, and single jack, and things like that, used to do mining by hand. I first began to work in mine in California, copper mine in Shasta County. The first time I was go, I was the mucker; I was car-man, run a car in a drift. I work there about six or seven months, car-man all the time. By a car-man I mean push the car in the drift. Then I went to work in Jackson, California. I did a couple of days' muck and then they put me

(Testimony of Frank Porter.)

tending chuck on a machine. I work three or four months tending chuck, and they give me a piston machine, used to be "baby" machine, they call him some places. I work down there I think couple of months. Then I come up to Blair here. At Blair I was working a machine in the Merry Mine, about a month. Then I go to work about twelve mile from Tonopah for a week, assessment work. Next I go to Mina; there was a mine I work down there, single jack; I think [77] the Silver Star Mine. After that I go to California, stay down there, and then I went to Arizona, where I worked in Gold Road Mine, running a machine. I went to work in the Keane Wonder Mine in 1911 and was working there in December of that year. The first time they give me a job mucker and they say the first chance I give you a job miner, which he did. I run a piston machine. On Dec. 9, 1911, I was working at the same place Mr. Cunningham was hurt. That day I clean one place. Half-past four we go home and I start at half-past seven in the morning. The first work I did that morning, I go to my place where they blast the day before, and after Mr. Roper come up and see what place to set out the machine, he say to go muck, clean him up; he give me Mexican help, and he say when I get through to set up my machine. I work before noon and some after noon to clean out place. I had Mexican to load a car, too. I set up machine.

Q. How long did it take you to set up your machine?

(Testimony of Frank Porter.)

A. Oh, not take long; sometimes he take long and sometimes not.

Q. Mr. Porter, I will show you this map, marked Plaintiff's Exhibit No. 1, and ask you if you can indicate upon that map where you set your machine up on the afternoon of December 9th, 1911—can you tell from that map?

A. Maybe something, not very much.

Q. Well, see what you can do with it. You can indicate the place where you set your machine up the afternoon of December 9th.

A. It looks like to me the machine in this place, because I know where I start. (Indicating on map.)

Q. Looks like what?

A. I was working in drift there, before, I was, and after they take me in the stope. It look like I set my machine up at this place (indicating figure 5 on the map); they was mucking here; and there was a piece of wood, we put it in the wheel cause the car would run too fast, and dump and go in the chute, and we put a stick to stop the wheel of the car, so it would not go too fast, and dump into the chute.

Q. Now, you know about Mr. Cunningham being hurt, do you? A. Yes.

Q. Where were you at the time Mr. Cunningham was hurt?

A. Well, I was just past there. I have to put up my machine, and everything; I try the bolts—the arm has two bolts—and I break one of them bolts, and I come up past here, I see there was a box of tools, a bar, and I go to get one of them and take them back;

(Testimony of Frank Porter.)

and at same time, I don't know, I can't say, [78] it all cave down; it get me, and I don't know what it was; they work like the devil, a bunch of men coming out, car-men and blacksmith, and everybody coming out, and they begin to get me out, and they have to get a bar to get out the big rock.

Q. Now, how far off were you from Mr. Cunningham at the time the rock fell and covered you up—about how far?

A. I can't tell cause a man go right through—here was the car, I can't tell how far I was.

Q. Do you know where the rock fell from?

A. From the roof.

Q. What kind of rock was it that fell?

A. *Metalli*.

A. Well, I know it was ore. I don't know if the waste come down; I know it was ore cause it drill that way—the piston machine it take about six or seven foot, and after, when you get inside, about six or seven or eight foot, use the Waugh machine to knock down the roof. The first thing you get the piston machine set up, and after seven or eight foot high you use the Waugh machine, cause the ore is too high, cause you can't set up your bar if it is too high; can't get a bar set up ten or fifteen or twenty feet, can't get over ten-inch bar to the piston machine."

You put six inch block under the bar, and six inch on top, and it makes lots of timber, sometimes, not all the time.

"Q. Did you drill any holes after you set your

(Testimony of Frank Porter.)

machine up? A. No, I never drill at all.

Q. Did you drill any holes that day at all?

A. No, I no drill at all that day.

Q. About what was the distance, Mr. Porter, from the foot-wall or floor, or bottom of that stope, to the hanging-wall or top of the stope, from which the rock fell upon you and Mr. Cunningham at that place?

A. About fifteen or twenty feet; I can't tell for sure."

The foreman of the mine at that time was Mr. Roper. He gives me a job.

"Q. Did you ever get any instructions from Mr. Roper or from Mr. Keith about your work?

A. No, they never say nothing to me, just give me a job, that is all."

I never saw any printed rules or regulations or instructions posted or stuck up around there.

"Q. Were there any timbers or stulls to support the hanging-wall at or near the place where Mr. Cunningham and you were hurt?

A. Two timbers [79] over the chute like that (illustrating); we have to have them to timber, 6 by 6, or 8 by 8, square timber, and in that stope there was no timber; in the other place there was some timber. The other place there was some timber, some stull—just put a little plank, two-inch cap on plank that long—it was in the other stope.

Q. Were there any of those stulls in the place where this rock fell?

A. No, there was no stull there at all.

(Testimony of Frank Porter.)

Q. How far from the place where this rock fell was the nearest stull?

A. Well, there was that two timbers in the chute, afterwards the pillar—there was one pillar afterwards—some stull on the other side, some stull where you dump the car.

Q. Then the pillar you refer to was between the chute and the other stull you mean?

A. Yes, there was one pillar after this side—the other side that stope—the other side the other stope there was some timber.

The COURT.—Perhaps you understand it, I don't.

Mr. MILLER.—I think I understand it.

Q. About how far was it from the chute where the two timbers were from the place where the rock fell?

A. Well, there was a piece—

The COURT.—Can you state just how many feet?

Mr. MILLER.—Q. About how far?

A. Oh, I think it was about 35 or 40 feet.

Mr. MOREHOUSE.—That is from the chute timbers to the—

Mr. MILLER.—That is from the place where the rock fell to the chute.

Q. Now, how far was that chute to the pillar that you speak of?

A. I think about sixty feet, something like that.

Q. And how far beyond the pillar were these other timbers in the other stope?

A. Oh, the other timber was about—oh, wide as this room here, and one pillar—put a timber, you

(Testimony of Frank Porter.)

see, some big rock too—one stull.

The COURT.—You had better repeat that, if you understand it.

Mr. MILLER.—Q. See if this is right, Frank. Beyond the pillar to which you refer about as wide as this room, to where timbers were—some timbers—no big rock?

A. Yes, some timber put—some waste.

Q. Did you see Mr. Cunningham after he was hurt? A. No, I could not see him.” [80]

After the rock fell on me they took me down to the mill. I think they took Mr. Cunningham down first; I don’t remember.

“Q. You don’t remember, all right. As a machine-man in that mine, working as you say, under the directions of Mr. Roper, whose duty was it to bar down or pick down or sound the rock after a blast to see whether it was safe, or to make it safe—whose work was it—whose duty was it to do that?

A. Well, I have to do it; it was my place if you see any loose ground.”

No cross-examination.

Saturday, November 22d, 1913.

Court convened, 10 A. M.

[Testimony of Dr. M. R. Walker, for Plaintiff.]

Dr. M. R. WALKER, called as a witness on behalf of plaintiff, sworn, testified as follows:

Direct Examination by Mr. MILLER.

My name is M. R. Walker. I reside at Reno, Nevada. I am a physician and surgeon, duly and

(Testimony of Dr. M. R. Walker.)

regularly licensed to practice medicine and surgery in said State. Have practiced medicine and surgery in this State a little over twelve years. I am President of the State Medical Society, also a member of various organizations and hold offices in them.

I met Mr. Cunningham, the plaintiff in this action, a few days ago. I made a practical examination of him, first by inspection and then by measurements and then by X-ray examination. I made two plates, giving four views, with an X-ray machine. I found upon examination that he had evidently passed through some severe injury, or had received severe injuries in some way; his left leg is badly injured; the lower end of the tibia and fibula had been broken and apparently some part of it had been lost; that is, he had lost a part of the bone. In other words, the left leg is shorter by considerable than the right, and it is also deformed, and the leg in general is somewhat smaller than the right, more than is usual. He had a flat foot, and a stiff ankle in the left leg.

Q. Could you point out, using Mr. Cunningham as an illustration, the bones you refer to, where the part of the bone was taken out; and the condition of the foot and leg?

A. I can refer to the leg. [81]

Q. You can also use your plates, if you wish, Doctor, in connection with your testimony.

(The plaintiff, Mr. Cunningham, removes his shoes and socks, and the witness illustrates his testimony by reference to the feet and legs of the plaintiff.)

A. You will notice here that the right leg has the

(Testimony of Dr. M. R. Walker.)

appearance of the usual normal leg; you will notice that the left leg is considerably different; this deformity is plain to be seen; and this indicates here that he has received a severe injury at some time; from the appearance I take it that it was what is called a compound fracture; that is, that the bones were crushed and broken, and probably broken through the skin; and evidently, from the appearance here, I take it that after the injury, before it healed, there was infection; in other words, suppuration or matter had come out of there. From the measurement that I got here, I take it that he has lost a considerable length of bone in these parts, but that after a time they healed together, and have become a solid part of the leg. In a normal leg there are two bones here in front, the one most prominent is called the tibia, and there is another bone that comes out here, a smaller one, which is not so apparent, called the fibula. Those two bones in this leg were evidently broken, and when they healed, they healed together; that is, instead of being separate, they joined together, and make one now at this bone; there is one solid point, that is, the same as being solid. With this foot, you will notice he has the normal motion of the foot that he should have; you will notice in this foot, if you will hold these two feet up, there is an arch normally to every foot, and in that foot you will notice you don't see the same amount of arch there; in other words, that is what we call a flat foot,—the arch has been broken down; it is hard to get very much motion out of that foot. He has difficulty in

(Testimony of Dr. M. R. Walker.)

getting around; there is some motion, but it is limited, quite limited. Now may I show this at the window? (Referring to X-ray plate.) I have made two pictures; I have made a picture of the normal leg, and of the injured leg. This view (referring to X-ray plate) is taken in what we call an anterior posterior; in other words, is taken from in front to back; that [82] is the view of the normal leg, and that is the condition that the normal leg should be in. Here you see the condition of the leg that has been injured (referring to second plate); it shows up plainly there that these bones are united at this point, and that they have come together in that leg. That is about all there is to be shown; it simply shows the condition we find; but you can see the deformity here, the same as you find there (referring to leg of plaintiff). That gives the normal and the abnormal. I want to show you the other plate, which gives the same view of the same limbs, but instead of being taken anterior posterior that I spoke of, I had his limbs turned over on that side, taking what we call exterior interior; meaning, in other words, from the outside in; the plate is put here on that side and it is taken through in that view (illustrating). Now, this view again indicates the right leg, which is the normal leg, raised over on this side; this plate shows the other leg, showing the injury; you see these united and left a spur hanging out over the side there, contributing to the deformity. That shows you very plainly the condition of the limb as you see it there. In the picture of the left leg, that is a spur

(Testimony of Dr. M. R. Walker.)

of the fibula, the small bone of the leg.

Q. Given a man weighing 188 pounds, in full strength and health before the time of his injury, having been caved on by a rock, and the lower left leg crushed to a pulp, both bones broken, the bone protruding through the skin, and having only first aid, such as washing, and so forth, from four o'clock, the time of the injury, until the next morning, and having one major operation the next day, setting the bone, and three minor operations afterwards, and lying eight months in the hospital, from your examination of Mr. Cunningham at this time, I would ask you to give your professional judgment as to whether or not such injury and such condition would result in any damage or injury to the nervous system of Mr. Cunningham.

A. It would. All injuries of that character will produce what we term medically as a profound shock, physically and mentally, you may say, and embracing the nervous system; so much so that it always results in considerable incapacitating of the individual.
[83]

The COURT.—You may answer the general question as to what will be the results in the future from this injury, as to his capacity to work, and his physical condition.

The WITNESS.—He will be very seriously incapacitated.

Mr. MILLER.—Q. Given the same state of facts as in the former question, based upon your examination of Mr. Cunningham, I will ask you to state—

(Testimony of Dr. M. R. Walker.)

The COURT.—You may go into that matter fully, if you wish.

“Q. (Contg.) Taking one hundred as the total number of units of his physical efficiency before injury, what percentage of efficiency now remains?

A. May I ask whether you mean that as to physical labor, or for anything?

Q. Common laborer, pick and shovel.

A. I should say that he has remaining probably twenty-five per cent.”

Q. Given the same facts as stated in the former question, based upon your examination of Mr. Cunningham, I will ask you to state whether or not in your professional judgment the injury to the nervous system of Mr. Cunningham would have a permanent effect upon his mental capacity?

A. That is difficult for me to give you a definite answer. In order to answer that, I would feel that I would need to observe the man for some time. Just now I would say that ultimately, I would not expect it to have any great influence on the mental capacity of the man. So far as the mental part of it is concerned I think ultimately he might recover from that.

Cross-examination by Mr. JARMAN.

Q. Doctor, what would you say from your examination as to the result obtained in this left leg after treatment, taking into consideration the nature of the injury, as described you by his counsel?

A. Well, judging from just what I can see of it, I should judge that they had obtained reasonable good

(Testimony of Dr. M. R. Walker.)

results, as good results as could be expected under ordinary circumstances. In the condition I find in that limb, I doubt whether there would be any farther improvement. In a general way, in injuries of that sort, for the first year or two years, or three years, the injured part on it [84] is more sensitive, more tender, and as time goes on it heals, and becomes more normal. As I understand, it is now some two years since it was injured, if I am correct. It is possible that it would improve some, but I can't say.

[Testimony of J. W. Legate, for Plaintiff.]

Mr. J. W. LEGATE, called as a witness on behalf of plaintiff, sworn, testified as follows:

Direct Examination by Mr. MILLER.

My name is J. W. Legate. I reside in Carson City and am Deputy Secretary of State, and as such have charge of the files and records of the Secretary of State's office. I have with me documents showing the registration of the Keane Wonder Mining Company of this State. (Witness produces papers, and hands to counsel.) This document designated on the front of it as "Designation of State Agent Keane Wonder Mining Company, Filed June 15, 1907, J. W. Douglass, Secretary of State, by J. W. Legate, Deputy," is a certificate appointing a person as agent, upon whom legal process may be served. The person who was appointed agent of the Keane Wonder Mining Company is named in that record.

"Mr. MILLER.—Q. Is that document part of the official records of the Secretary of State?

(Testimony of J. W. Legate.)

A. Yes.

Mr. MILLER.—If your Honor please, we desire to offer it in evidence.

Mr. MOREHOUSE.—To this document we object on the ground that the same is incompetent, irrelevant and immaterial; for the reason that the cause of action is based upon an injury occurring December 9th, 1911, and that this does not show that the corporation defendant, the Keane Wonder Mining Company, was engaged in business, or was within the State of Nevada at the time this action was commenced, or that it has continued to comply with the law of the State of Nevada in keeping up and maintaining a resident agent, or that it has followed any of the statutes since 1907; or that it has done any business in the State, or is doing any business in the State, that compels it to maintain a resident agent, or that its officers are the same, or that it has continued to comply with the law of the State. [85]

The COURT.—I will make a *pro forma* ruling admitting it, but I don't think it need be read to the jury at the present time. I presume this is to be followed by other motions and proceedings before the Court.

The COURT.—Just read it into the record and then you will have your copy here.

Mr. MOREHOUSE.—Q. That is the only document you have in your office with regard to the Keane Wonder Mining Company, after making diligent search and investigation? A. No."

(Testimony of J. W. Legate.)

There is another paper which was filed on November 18th, 1913.

Mr. MILLER.—Then I will proceed to read it. (Reads:) Endorsement: “Secretary of State’s Office, Nevada. Keane Wonder Mining Co., a Corporation. Designation of State Agent. Filed June 15, 1907. W. G. Douglass, Secretary of State, by J. W. Legate, Deputy.

“State of Nevada, County of Esmeralda, ss. J. R. Elgan, being first duly sworn, deposes and says, that he is an officer, to wit, the Secretary of the Keane Wonder Mining Company, a corporation, organized, existing and doing business under the laws of the Territory of Arizona; that affiant is familiar with the history of said company and with all of the facts relating to its commencement of business in the State of Nevada; that said company was incorporated on the 7th day of March, 1906, by the filing of its articles of incorporation with the proper county and territorial officers of said territory of Arizona; that immediately thereafter said company acquired certain mining claims in the South Bullfrog Mining District, California, better known as Keane Springs, and continued the work of developing the same commenced by its predecessors in title, and has ever since diligently prosecuted, and is now diligently prosecuting such work. That said company did from the 7th day of March, 1906, until about November 19, 1906, maintain an office in Rhyolite, Nevada, in charge of one George Edgar Johnson, in which the business of said company was transacted continually and without sus-

(Testimony of J. W. Legate.)

pension until said last mentioned date, when said office was removed to Goldfield, Nevada. That said Goldfield office was established on or about said last [86] mentioned date, and has ever since been maintained in charge of affiant, and the business of said company has been prosecuted therein continually and without suspension from said last mentioned date to the date of those presents. Said company owns no claims and operates no property in the State of Nevada, transacts no business in said State, except in relation to said above mentioned claims. (Signed) J. R. Elgin.

Subscribed and sworn to before me this 27th day of May, 1907. Augustus Tilden, Notary Public in and for Esmeralda County, Nevada. (Notarial Seal)."

The attached document reads: (Reads:)

"Designation of Agent for the State of Nevada. Know all men by these presents; that the Keane Wonder Mining Company, a corporation formed under the laws of the State of Arizona, and carrying on the business of mining in the States of Nevada and California, has constituted, appointed and designated, and by these presents does constitute, appoint and designate, in accordance with a resolution duly adopted by the Board of Directors of said company, J. R. Elgin, residing in Goldfield, Nevada, its resident agent in said State of Nevada, upon whom process issued by authority or under any law of said State of Nevada may be served.

In Witness Whereof the said company has to

(Testimony of J. W. Legate.)

these presents affixed its corporate seal, and caused the same to be subscribed by its president, and attested by its secretary this 30th day of March, A. D. 1907. (Signed) Homer Wilson, President. Attest: J. R. Elgin, Secretary."

And the impress of the seal of the corporation in the following words and figures, to wit: "Keane Wonder Mining Company, Incorporated, March, 1906, Arizona." Are you through with this witness?

"Mr. JARMAN.—No. One question.

Q. Mr. Legate, you spoke about having another document, as alleged to have been filed in your office by the Keane Wonder Mining Company in 1913, did you mean to say that document was filed by the Keane Wonder Mining Company?

A. No, I didn't understand your question—I meant in relation to it."

"Mr. MILLER.—Plaintiff rests." [87]

"Mr. MOREHOUSE.—Now, if your Honor please, I desire to make a motion addressed entirely to the Court.

The COURT.—Are you prepared to discuss the motion right away?

Mr. MOREHOUSE.—Yes.

(The jury is admonished by the Court and excused until 2 o'clock P. M.)

Mr. MOREHOUSE.—I wish now, if your Honor please, to move the Court for a directed verdict in behalf of the defendant, or a nonsuit, as the Court may see fit to call it, upon the ground:

1st. That the action is brought as a statutory

(Testimony of J. W. Legate.)

action exclusively, under the Act of April 8, 1911, of the State of California; and that it appears by the admission in evidence and the facts at this time, that the defendant, the Keane Wonder Mining Company, has never served any notice that it would comply with, or become subject to, the act of the State of California, upon which this action is based;

2d. Upon the further ground that the action is based upon a statute of the State of California of April 8, 1911, and that it appears from the testimony in this case that the injury upon which the action is founded occurred on the 9th day of December, 1911, in Inyo County, State of California; and that the act in question is contrary to the public policy of the State of Nevada, and therefore the Court will not, under the law of comity, permit the suit to be prosecuted in this State.

And for the further reason, under this subdivision of the motion, that it appears from the evidence that the mining property, and the place of business conducted and carried on by the Keane Wonder Mining Company, is in Inyo County, California, and that the defendant, Keane Wonder Mining Company, at the time of the accident was, and ever since has been, engaged in business in Inyo County, State of California, and has never removed from that State into the State of Nevada. So that the plaintiff, having the right of service of process, the prosecution of his cause of action in California, and the property of the Keane Wonder Mining Company being situated there, that a judgment recovered there could be en-

(Testimony of J. W. Legate.)

forced under the laws of the State of California, and cannot be enforced, if recovered, [88] in the State of Nevada.

The COURT.—That simply goes to the point that this court has no jurisdiction, does it not?

Mr. MOREHOUSE.—That goes to the point so far as the prosecution of this action is concerned, neither the State nor this court has jurisdiction. Of course there has been jurisdiction of the person, but it is going now to the subject matter of the action.

3d. That in the event the Court, in passing upon this motion, should conclude that the plaintiff and the defendant are under the provisions of the act of April 8, 1911, of the State of California, and that the plaintiff, being under the act, would have the right to prosecute the cause of action against the defendant, though he had not come under the act, then and in that event, the cause of action cannot be prosecuted for the reason that no evidence has been offered before the court or jury that the notice of the accident as provided by section 10 of the act of April 8, 1911, has ever been served within thirty days after the accident, or within one year, which is the statute of limitation provided in that section, or at all, and that this action of the statute is a condition precedent to the prosecution of this action.

4th. That the evidence in this case utterly fails to establish any negligence on the part of the defendant; that we have no evidence, except of the bare fact of an injury or accident, and that that does not establish negligence, either as proof or as a presumption,

(Testimony of J. W. Legate.)

in this class of cases; and that the consequence of that upon this motion, standing in the nature of a demurrer to the evidence, it becomes a question of law for the Court, and not a question of fact for the jury." (Argument.)

"Monday, November 24th, 1913.

Court convened 10 A. M.

(All parties present. After calling of the roll the jury is excused for fifteen minutes.)

The COURT.—I shall not go into this motion at any length: I will simply state as briefly as I can my reasons for overruling it. In my judgment, this action is not brought under the act of April 8th, 1911. The right to bring such an action was granted by previous law of California. Plaintiff here has simply sought to avail [89] himself of the provisions of the act of April 8th, 1911, which deprives an employer of certain common-law defenses.

It is apparent that defendant has submitted itself to the jurisdiction of this court. What might have been the result if other action had been taken when the suit was brought, is unnecessary to say. Whatever objection defendant had to the jurisdiction of the Court over its person has been waived.

The difference between the California statute and our own law is not sufficient to prevent this court from taking jurisdiction. It is a well established rule in cases of this kind that a defendant cannot be compelled to pay damages, and there is no case against him, unless the injury resulted from negligence. While the injury itself, under some circum-

(Testimony of J. W. Legate.)

stances, is evidence of negligence it must appear, in order that it may have that effect, that the accident could not have occurred, unless there was negligence on the part of someone—unless from the happening of the accident, it is very probable that it could not have occurred except by the negligence of the defendant.

Much has been said in the course of the trial about the failure to promulgate rules. There are many decisions holding that the failure to promulgate rules is negligence, but when counsel for plaintiff was asked during the argument what rule could have prevented this accident, his only suggestion was a rule forbidding employees from going into dangerous places. Such a rule would hardly be serviceable. If defendant is to be held for negligence in failing to provide a rule, some connection must be shown between failure to provide a rule, and the accident; it must appear, in some way, that the failure to provide a rule caused the injury.

If the company had been negligent in the construction of its hoisting works, for instance, it might have been the grossest sort of negligence, but it could not be regarded here as a reason why the plaintiff should recover, unless it were shown that the defect in the hoisting works in some way caused this ore to fall.

There is no showing that any of the employees were incompetent. Much was said about the failure to give warning. When the duty to warn is present, it [90] necessarily predicates, not only that there is danger, and reasonable cause therefor, but it also

(Testimony of J. W. Legate.)

predicates the fact that the party upon whom the duty is laid, must know of the danger, or must have some cause to apprehend it, or could have discovered it if he had performed his duty.

There is no evidence here showing conclusively that the defendant failed to inspect this roof. True, Mr. Porter, says it was his duty to do it, and there is testimony showing that Mr. Roper didn't do it; still it is not necessary that the company should have performed its duty through these people. Mr. Wilson himself might have performed the duty; others might have performed it, hence the failure to inspect does not seem to me to have been established.

It appears from the testimony that the accident was caused by the falling of a body of ore—something like sixty tons—which it is alleged could not have occurred if the roof had been properly supported. This no doubt is true. If there had been a support under the ore, it probably would not have fallen, but, so far as the evidence shows, such an accident never occurred before. It does not appear from the testimony that any ore or rock ever fell from the roof of that chamber before. The chamber was in the neighborhood of six hundred feet in circumference; it must have been something like two hundred feet in diameter. At points, the roof was twenty feet from the floor; at others it was in the neighborhood of sixty feet. The supports and pillars were few in number; but, in the absence of any showing that these were insufficient, I do not see how we can assume there was any negligence on that

(Testimony of J. W. Legate.)

score. If it had appeared that caves were frequent, then there would have been evidence tending to show the company was negligent in failing to have proper supports for the roof, but there is nothing of that sort here.

It seems to me the only testimony conveying a definite idea that defendant was negligent, was the falling of the orebody itself. It is not my duty to weigh the testimony; it is simply for my determination, as a question of law, whether there is any testimony showing negligence. Now, here is a large chamber; at the point where the accident occurred the hanging-wall was twenty-five feet above the foot-wall, and an enormous [91] body, sixty tons of ore, were left on the hanging-wall. It seems to me that in itself, was negligence; at least it is a fact tending to show negligence. On the existence of that fact I hold there is testimony here showing negligence. The motion is denied.

Mr. MOREHOUSE.—Your Honor will allow us an exception.

The COURT.—Certainly.

Mr. MOREHOUSE.—“If your Honor please, as I understand it, on the first point it is decided that the suit was not necessarily brought under the act of April 8th, 1911; would we not then be entitled to have those portions of our answer which have been stricken out, reinstated as a part of the pleadings?

The COURT.—Not on the theory that I take of the case. The suit was brought under the law as it existed before, but it was also brought in view of the

(Testimony of J. W. Legate.)

law of April 8th, 1911, which, in my judgment, deprives the employer of his common-law defenses in a case of this sort. Now, that law divides employers into two classes; there are those who voluntarily come under the act, and those who do not; but the first section says that all corporations and all employees are deprived of these common-law defenses. I cannot read the first section as having any restriction or limitation; it applies to all employers of labor; and section 3, and the subsequent sections of the act, provide a method by which corporations, who do not care to litigate with their employees questions of this sort, where they are deprived of their common-law defenses, can avail themselves of that portion of the act which provides for compensation rather than damages.

In making this ruling in reference to the testimony, I do not know whether I made myself perfectly plain, but the fact that the material was of the character it was, and the attendant circumstances in addition to the accident, was what controlled me in making the ruling. If there is anything about it you do not understand, in order that you may avail yourself of the error, if I made one, I desire to make it clear.

Mr. MOREHOUSE.—I concede that upon questions based upon evidence, that the rule which your Honor announced is the correct rule; and I realize the slight distinction in the motion which you have made, and the ruling [92] of the Court as to the bearing

(Testimony of Homer Wilson.)

on that particular point, and one point only, of the testimony.”

(At this time the jury is returned into court.)

[Testimony of Homer Wilson, for Defendant.]

Mr. HOMER WILSON, called as a witness for defendant, after being sworn, testified as follows:

Direct Examination by Mr. MOREHOUSE.

My name is Homer Wilson. I reside at Keane Wonder, California, and have resided there about six years. I know the defendant, the Keane Wonder Mining Company, a corporation and have been president and general manager of said company since 1907. I am thoroughly familiar with the underground workings of the Keane Wonder Mine and was familiar with them on December 9th, 1911, as I was there at that time. The superintendent was John Keith, and George Roper was foreman. I have made a diagram or map of an underground working as it was on the 9th day of December, 1911; it was made the next two days after the accident. John Keith and I went up the next morning, and it took about two days to make the survey there. We made the underground surveys and diagram by making the regular survey with an instrument. John Keith handled the instrument and I assisted him part of the time, and another man part of the time—two of us were there with him. I am familiar with the use of instruments and making measurements and I know absolutely they were accurately made. I have been actively engaged in the mining

(Testimony of Homer Wilson.)

business for eighteen years, as general manager, president of the different companies in which I was interested. The Keane Wonder Mining Company was organized before I purchased it; I purchased the company after its organization, it had already been organized. At the time this accident occurred my headquarters were at Keane Wonder. The only office or place of business I have other than the Keane Wonder Mine is the transfer office in San Francisco, the secretary's office. Have had no offices in this State since October 10th, 1907; we removed all offices then to the mine, excepting the secretary's office. The transfer office at that time was in the Monadnock Building, San Francisco. I am familiar with the map on the board and this is an accurate [93] survey of the ground at that time; this is the working-map at that time showing the position of the ore bodies, and the different drifts, cross-cuts, upraises, and so on. There is one other map here; I would like to put up another cross-section map here to show the cross-section from a different point.

This line indicates the hillside, or mountain side, where the work is being carried on, and this number 4 tunnel through which the men had to go, or this tunnel here, which is a cross-section, you know, like you were in this building, so as to show the different floors. Every workman working along the lines here, had to go through this number 4 tunnel.

(The large map is marked "A"; the cross-section map through No. 5, is marked "B"; and the cross-

(Testimony of Homer Wilson.)

section through shafts and tunnel numbers 1, 3 and 4, is marked "C.")

"A." This map ("B") shows number 4 tunnel, in which they would have to go to reach this ore body where these works were being carried on; and it also shows the upraise from number 5 tunnel to that ore body, through which the ore was dumped into a chute, and it was carried from there out to the rock-breaker.

Q. While you are at it, so the jury will understand it, I am going to mark this tunnel here as number 4. And this tunnel is number 5, isn't it?

A. Yes, that is number 5.

(The points indicated are marked 4 and 5 by counsel.)

Q. Now, what does this represent (indicating)?

A. That represents the upraise from number 5 to the workings that were going on at this point, which was reached through number 4 tunnel. It was usually known as the 180-foot level from the shaft."

"Mr. MOREHOUSE.—I will mark this as upraise, then. (Point indicated is marked 'Upraise' by counsel.)"

With reference to that, that is, from number 4 tunnel, that was the chute that all the ore taken from this ore body here was dumped down through the chute into that. The ore body they were working in is marked in yellow.

"Q. I will mark that ore body. (The point designated is marked 'Ore Body' by counsel.)" [94]

(Testimony of Homer Wilson.)

“Mr. MOREHOUSE.—I will mark that ‘ore’ and this ‘ore.’ (Marking on map.)”

Mr. MOREHOUSE.—Q. Now, in number “C,” this line represents tunnel number 4—this same tunnel as here (referring to map “B”)?

A. Yes, same tunnel.

Q. Now, what is marked here in yellow? (Referring to map “C.”)

A. That is the same ore body.

Q. That is the same marked “180-foot level”?

A. From the shaft.

Q. Is the same ore body that is marked ore body on map “B”?

A. Yes, on map “B”; the shaft is indicated; this is not a cross-cut through the shaft, but it is indicated as you see here.

Mr. MILLER.—By the dotted lines?

A. Yes, but in this shaft the cross-cut is clearly indicated, being a cross-cut through that shaft, and that ore body they were working in at that time was first encountered in that shaft, and then we drifted back to the shaft from this upraise that came from number 5 tunnel.

Mr. MOREHOUSE.—Q. Now, I will draw these little lines down here, and that indicates this upraise? (Draws.)

A. That upraise at this cross-cut.

Mr. MILLER.—Q. The lines drawn by Senator Morehouse on map “C,” and marked “upraise,” indicate the same upraise marked on map “B”?

A. They may not be absolutely correct; it is in-

(Testimony of Homer Wilson.)

dicated approximately there, but we would have to measure that; but this is absolutely correct here.

Mr. MOREHOUSE.—Q. What is this line?

A. That is the shaft. (Referring to map “C.”)

Q. I will mark that “Shaft.” (Marks on map “C.”)

This mark between two arrows, 50, on map “C” is the vertical distance, between this drift or tunnel, and that ore body. That is tunnel number 3.

“Q. Is this map correct—map ‘C’?

A. Absolutely.

“Q. And the lines indicating the 100, 200, 300, 400, 500, 600 and 700 feet, designating the distances between north and south and east and west on map ‘C,’ are correct?

“Yes; each of those squares represents a hundred feet—a hundred foot square.

“Mr. MOREHOUSE.—Now, I will offer, if your Honor please, Maps ‘B’ and ‘C’ in evidence.”

Mr. Keith kept all the data for the maps in his note-book. He made the first sketches of maps “B” and “C” from his notes. I had nothing to do with making those particular maps, taking the data and making and drawing them, [95] except to take the sketch, the same as this, and take it to the map man, and have him make it. Mr. Keith had made the rough sketch or map or foundation of it.

“Mr. MILLER.—May it please the Court, I think in order for this to be correctly done, they should introduce Mr. Keith’s testimony to show the data is correct, and these maps are correct from his data.

(Testimony of Homer Wilson.)

It appears this witness had nothing to do with the making of these maps, save and except he carried the chain for Mr. Keith at the time of making the survey. So far as this witness' testimony is before the court, these maps may not be accurate. Mr. Keith may be able to give us the correct testimony.

The COURT.—Do you contend that the surveyor must be present and that he alone can testify to the correctness of the maps?

Mr. MILLER.—So far as the maps in evidence before the court, I think so.

The COURT.—The witness has testified they are absolutely correct.

The COURT.—The maps will be admitted.” (The maps are marked Defendant's Exhibit “B” and Exhibit “C.”)

“Mr. MOREHOUSE.—Q. Now, we will take map ‘A.’ Explain to the jury that map, showing the entrance on tunnel number 4.

“A. This, of course, is a horizontal section of the workings there, just like if that wall there—if I am permitted now to enter into this in a practical way?”

“Q. These curved lines, as I understand it, that I am running my pencil over—I have not marked them yet—are the ore bodies?”

That was the face of the ore on December 9, 1911.

“I will mark this ‘ore body,’ then. (Marks on map ‘A.’) I will mark it ‘ore’ in several places, so we will understand what it is. Now, what does this part of the map represent, in the southwestern part of the map?

(Testimony of Homer Wilson.)

A. That represents the part of the ore body that has been worked—worked out.”

“Q. Then I will mark this ‘worked ore body.’ (Marks on map ‘A.’)

“This northeastern part of the map had also been worked.

“Q. This was worked out. (Marking on map.)

“A. It is worked, except where you see a pillar indicated; there are different pillars left along there.

“Q. These circular lines, or very nearly circular lines, all over the [96] map, indicate what?

“A. Pillars.

“Q. And what do they represent—were they ore bodies?

“A. They were ore left there to sustain and hold up the hanging-wall to keep it from falling.”

“Q. Now, what does the line that is indicated on this map as a straight line, curving here at one little point, and crossed with several little dots, what does that represent on this map?

“A. That is a car-track that the ore was handled over, where they were working to the chute.

“Q. I will mark this car-track on the map. (Marks.) What do these little broken lines running from the car-track—what does the curved part of it represent?

“A. That is the switch.

“Q. I will mark it switch. (Point marked on map.) And what do the dotted lines running from the car-track in a northwesterly direction indicate?

“A. That indicates the survey that was made at

(Testimony of Homer Wilson.)

that time on which the track was to be extended—it was to be extended right along through here (indicating on map).

“Q. There was no track there on the 9th of December? A. No.”

“Q. What are these lines underneath here on this map to indicate?

“A. They indicate at that time we expected to run certain drifts across to a tunnel that we were driving through here, and just had the survey made, to indicate workings which we expected to carry out.”

“Q. When did you say that that survey was made for your map?

“A. It was made the day after—well, two days; the survey was finished in two days after the accident.

“Q. Now, as to the lines that are indicated as pillars, do they actually represent where the pillars stood on that date? A. Actually.

“Q. And the lines indicating the ore bodies represent the ore body as it stood on that day?

“A. Yes, sir.

“Q. Now, what do you say as to the accuracy of that map?

“A. I say it is absolutely correct, according to actual survey and measurements.

“Q. And you participated in that survey and those measurements? A. Yes.

“Q. And you know it to be accurate of your own knowledge? A. Yes, sir.

(Testimony of Homer Wilson.)

“Mr. MOREHOUSE.—I offer map ‘A’ in evidence.”

“The survey for this map was begun a day after the accident by John Keith, myself and a man named Seaman; I held the tape-line. Sometimes [97] I helped to figure out the angles and terms. Mr. Seaman carried the tape sometimes. Mr. Keith took the data and drew the map a few days after the accident. He made the survey and as soon as he could get at it he made his drawing. It might have been a week or more. I overlooked his work and was present when he made it.”

Mr. MILLER.—“If your Honor please, we object to the introduction of map ‘A’ on the ground it was made by Mr. Keith; Mr. Keith took the data; the witness merely carried the tape-line and acted as chain man for the surveyor.

“Mr. Keith took down the data and measured it and made the map, and necessarily it was without the knowledge of this witness, as to the accuracy of the distances outlined on this map and so far as he testified it is hearsay.”

The COURT.—“Q. Have you verified the distances that map?” A. Yes.

“Q. All of them?” A. Yes.”

The COURT.—It will be admitted.

Mr. MILLER.—I ask your Honor to kindly save us an exception on the grounds stated in the objection.

The COURT.—Note the exception.

“The COURT.—It will be admitted.” (Map ad-

(Testimony of Homer Wilson.)

mitted in evidence, and marked Defendant's Exhibit "A.")

There were three piston machines in that mine on level number 4 on December 9th, 1911. This man Porter had charge of one; another man they called Mack, I don't remember his other name, had the other; and I don't remember the name of the man who was running the third machine. I know where these machines were situated at that time.

"Please point out where Mr. Porter's machine was.

"A. Porter's machine was at that point right there.

(Indicates on map.)

"Q. I will mark that on map 'A' with the letter 'P' and a cross. (Marks on map.)"

Q. Now, kindly designate on the map where the machine was that was being conducted by Mr. Mack.

A. That was at this point (indicating on map).

Q. I will put a cross there, and mark it "M." (Marks.)

Q. Now, kindly designate on the map where the third machine was under the employee or man whose name you cannot recall.

A. That was in here, at that point (indicating). [98]

Q. I will simply mark that with a cross, without any letter, because we haven't the name. (Point marked "X.")

I was not present at the time of the accident. I was in this level number 4 the day before, also the

(Testimony of Homer Wilson.)

next day after the accident at about ten or eleven o'clock. I observed that the rock or ore or waste, or whatever it was, had fallen down.

“Q. Will you designate on this map the point where the rock had fallen?

“A. It was at this point, right near the point where the switch was taken off—right here. (Indicates.)

“Q. Just take the pencil and mark X there at the point where it fell. (Witness marks the point on map ‘A.’)

“Q. I will mark that for convenience, and so we will all understand it, ‘X Cave’; what I mean by that is the rock that had fallen down. (Point marked on map ‘A.’) Now, these circular marks near this place where I have marked ‘X Cave,’ represents what? A. Pillars.

“Q. Do you know the size of those pillars?

“A. Well, the exact size is about indicated on that map there; they vary from ten to twelve feet in diameter.

“Q. And what height?

“A. From the height of the distance between the foot and hanging-wall, about twelve feet.”

The height of the stoped-out ground, up towards the face of the ore body, from the foot to the hanging-wall, or top of the stope, would vary from eight to fifteen feet, seldom more than fifteen feet, seldom less than eight; it was not absolutely the same.

“Was there any point anywhere in this worked out portion of this level number 4 where the height

(Testimony of Homer Wilson.)

from the foot to the hanging-wall was over fifteen feet. A. No.

“Q. Was there any point from the foot to the hanging-wall that was fifty or sixty feet?

“A. No, sir.

“Q. What was the greatest height from the foot to the hanging-wall, in any portion of the excavated territory? A. The greatest height?

“Q. Yes.

“A. Oh, fifteen or eighteen feet would be the highest.”

We would put in a stull now and again, where it was needed. I know the character of the rock in this mine. The ore was a quartz, white quartz, carrying two to four per sulphurets, lead and iron. It is [99] known as a low-grade mine. As to the character of the rock through which I worked that was in ore, the country rock is schist and the hanging-wall is schist. The next day after the accident when I went into the mine I saw a mass of schist off from the hanging-wall—slab off the hanging-wall—waste.

“Q. Had you observed any danger in that point it fell, at any time previous to this? A. No, sir.”

“Q. Did you make any examination of this schist rock for ore?

A. “I made no special examination; it was simply a lot of schist.”

The muckers had thrown off what had fallen on the track when I entered the mine. The track was clear and the car was in operation.

(Testimony of Homer Wilson.)

“Q. How long had these muckers been at work there if you know?

A. “Well, they had worked that night and that far in the forenoon when I got there between ten and eleven o’clock.”

It was between ten and eleven o’clock when I got there. There were four muckers; they were not working at that point. I could not say just how much of this fallen body they had removed; they simply shovelled it off of the track, so they could get along with the car. In regard to how much tonnage had fallen from the roof, I would not want to state that there was a ton; as a matter of carloads, I should say there was about two or two and a half carloads, at most, that I saw there. Those cars hold about three-quarters of a ton. The foreman that day was George Roper. I know the location, as I have it marked, of the car-track. The switch was put in the day before the day of the accident.

Instructions were given by me to the superintendent. The instructions were to keep the car-track moved up as close as practical to the face of the ore body they were working in, so as not to have to shovel the ore any great distance; to keep the car as near to the ore as they could. The switch was being built so as to get the car up close to where the machines were breaking the ore.

On that day the men were working with those three machines right as indicated there on that map; machine-men, and the muckers that were working along the line of the machines. [100].

(Testimony of Homer Wilson.)

At the time of the accident there was no work being done at the point where I have marked on that map "cave."

"Mr. MOREHOUSE.—Q. Do you know what work was being prosecuted on the 9th day of December, 1911?" "A. Yes, I know they were working.

"Q. You know that of your own knowledge?

"A. Yes, sir, I do."

Mr. MOREHOUSE.—Q. State exactly what work was being done or prosecuted on the 9th day of December, 1911?

A. Those three machines and one Waugh drill were working there on that level.

Q. You were in there the day before, as I understood you to state? A. Yes, sir.

"Will you state what muck there was to be removed on the day that you were in there, by your muckers; on the day before the accident, and at the point where the accident occurred?"

"The COURT.—Q. You were at that point the day before the accident?

"A. Yes, sir.

"Q. What time of the day was it?

"A. In the forenoon."

(By direction the reporter reads the question.

"The WITNESS.—There was none to be removed."

The COURT.—You want to know whether the muckers on the day shift removed the muck that was left there by the machines on the night shift?

Mr. MOREHOUSE.—Yes.

(Testimony of Homer Wilson.)

The COURT.—I will allow the question.

The WITNESS.—Yes, they do.

Mr. MOREHOUSE.—Q. Now, what other source, if any, was there in this mine on the 8th, when you were in there, preceding the accident, and on the 9th, when the accident occurred, to muck in the mine on this fourth level?

A. Any other source except from the drills, you mean?

Q. Yes.

A. Why, no, there is no other way of getting ore, except to break it with the drills.

Q. Had there been any caves immediately preceding the 9th of December, 1911? A. No, sir.

From the hanging-wall, on the 8th of December, 1911, there was no schist falling at the point where these people were at work on the 9th.

“Q. When you were in there on the 8th of December, 1911, what, if anything, did you observe that indicated any possibility of caving at the point where the cave took place on the 9th of December?

“A. No, there was no indication.

“Q. On the 8th day of December, 1911, when you were in there, was there anything which came to your knowledge that indicated the [101] possibility of caving at the point where this accident occurred?

“A. Nothing.

“Q. How long were you in there on the 8th, through this fourth level? “A. Oh, about an hour.

“Q. Was any complaint made to you?

“A. No, sir.”

(Testimony of Homer Wilson.)

“Q. I asked you whether any complaint was ever made to you by the plaintiff at any time during the time he was at work there? A. No, sir.”

The COURT.—He has already testified that he did not make any.

Mr. MILLER.—The plaintiff testified to that.

Mr. MOREHOUSE.—Q. Was any request of any kind ever made to you for safer conditions than existed in the mine at the time the accident occurred, by the plaintiff? A. No, sir.

Q. Or any other employee who was working in there at that time? A. No.

Q. Why did you leave pillars when working on this level?

“A. Why, to support the hanging-wall, to prevent it from caving.

“Q. At the point where this caving took place, how far was it from a pillar or pillars, and if you know,—state the distance?

“A. Well, it was close by; I should say 10 or 12 feet from the pillar.

“Q. What is the longest distance from one pillar to another, if you know, at the point where the plaintiff was at work on the 9th?

“A. I think it is twenty-three feet, by actual measurement.”

I first heard of the injury to the plaintiff when they brought them down, in the evening; I don't recall the exact hour, it was, I think, after supper-time. I immediately telephoned to Rhyolite to a physician to come out. I telephoned first to Doctor Burlette.

(Testimony of Homer Wilson.)

We put them on beds, washed their wounds and dressed them. I was present and directed what should be done. As soon as Doctor Burlette got there he dressed the wounds. Then I telephoned for Doctor Wheeler at Goldfield. I was not there when he arrived. After Doctor Wheeler arrived he took plaintiff in the auto and brought him to Goldfield. I wrote to the doctor to give him the best attention possible and to advise me how he got along. The company paid all the expenses to Doctor Wheeler and Doctor Dunne. I signed the checks.

Cross-examination by Mr. MILLER.

I have resided at the Keane Wonder Mine about six years. I have [102] stayed there almost permanently since October 10th, 1907. I never resided at Rhyolite nor made it my stopping place. I have stopped there some nights, perhaps maybe a day or two, especially if we were shipping machinery. I was in the works, not in the mine, on the night of December 9th, 1911. I was not in the mine the day of the accident, but was in there the day before, around 10 o'clock in the forenoon, and stayed about an hour, going all through the mine, on every level we were working on and made an inspection of the workings. I went on the fourth and second levels; those were the only two we were working in at that time. I entered the mine on the fourth level, through tunnel number 4. I stayed on the second level probably half an hour, where there were men working. I saw Mr. Roper in the mine. I would not want to swear that I saw Mr. Cunningham, because I would

(Testimony of Homer Wilson.)

see him just the same as I would any other man at work; to identify him, I would not want to do that; I would not want to say that I actually saw him. The same answer applies to Mr. Porter. I have had about eighteen years mining experience, as general manager and president. I was superintendent of the Jenny Lind Mine in Trinity County, and the Chloride Bailey in said county, and the Gambetta Mine in Madera County.

“Q. Calling your attention, Mr. Wilson, to the map, Defendant’s Exhibit ‘A,’ and directing your attention to the car-track, I will ask you to state whether or not there was any track extending from the switch, other than the track that was placed there on the 9th of December? “A. There was.

“Q. Is it indicated on this map? “A. No.

“Q. I wish you would so indicate it. Just draw a line in the same way it is there, if you have no objection.

“A. It is about here (drawing in map); the distance I could not say. Of course I did not survey that; I might have it absolutely correct, and I might have it not absolutely correct.

“Mr. MILLER.—Q. That is your best judgment, is it? A. Yes.

“Q. And this which you have just marked on the map was the main track before that switch was put in? A. Yes.”

I think the track which I have just marked on there was in use on December 8th, for transporting ore; that ore was being taken along in through [103]

(Testimony of Homer Wilson.)

here (indicating on map "A"); before it was worked out in these places, the foot-wall being sloping. It would be hard for me to say exactly the point from which the ore was being taken over that main track, because it was being taken from different points along there on those days, and they were moving the machines, on December 8th. I could not mark just where the ore was coming from on that day—from some point along the breasts.

"Q. Will you mark with a pencil, Mr. Wilson, the track which you have just drawn on that map, with the letter 'W'? (Witness marks track 'W'.)

"Q. Now, was there a pillar of ore between the track which you have just marked 'W,' and the surveyed track which is indicated on that map?

"A. Yes.

"Q. What was the size of that pillar which you have just stated was between the surveyed track and the main track, which you marked 'W'?

"A. Well, it was an ordinary size pillar, I could not state positively as to the thickness of it; it would vary anywhere from ten feet to perhaps fifteen, in diameter.

"Q. That particular pillar? A. Yes.

"Q. Give your best judgment of the diameter of that particular pillar.

"A. I should say it was at least eight or ten feet in diameter."

Q. Calling your attention to the mark X upon the map, indicating the machine run by the other man whose name you do not recall, I will ask you to state

(Testimony of Homer Wilson.)

whether or not the muck from the working of that machine was taken over this track "W"?

A. It was.

I gave no instructions for the making of the switch to that track, that was Mr. Roper's business. I was not with Mr. Roper in the mine on December 8th; he was busy at his work; I was with John Keith, the superintendent; he and I would usually go through together. I would always see Mr. Roper in the mine and talk with him. At the time of that conversation, I could not say just where we were; I might have passed him some place, and I might not have met Mr. Roper in the mine on the fourth level that day at all; I might have seen him in the blacksmith shop, or some place on the works. I am positive I saw Mr. Roper in the mine that day, but just to tell you where I saw him, I would not undertake to do it.

"Q. Did you go to the point where this machine run by Mack was working on the 8th?

"A. I was at where every machine was on the 8th; I always [104] did that, to look at the faces where they were working, to see if there was any change, or what the conditions were; that was my business.

"Q. How often did you go in the mine?

"A. Sometimes I would be there every other day; sometimes I would be there twice a week, it depended on what other matters I had to look after.

"Q. Did you make any examination of the hanging-wall of the stope on the 8th?

"A. I always looked at the hanging-walls every time I would go in the mine.

(Testimony of Homer Wilson.)

“Q. You would look at them?

“A. Always, yes, sir; and look at them carefully to see if I see anything that looks dangerous, and I would call Mr. Keith’s attention to it.”

Doctor Burlette got there I think between 8 and 9 o’clock just the exact time I would not be positive, just as quick as he could get there. I paid all the expenses at Goldfield. I have not the vouchers with me, and I could not tell you from memory just how much it was, but I paid every bill sent by the hospital, except the last two. The bill was running from \$105 to \$120 per month; that is what I was paying, and the last two was either \$105 or \$120, I would not be sure about that; those two I didn’t pay because they had them put the matter in the hands of the lawyers.

There were some muckers working on the night shift, the night of the 9th.

The height of the pile of muck on the foot-wall when I saw it was probably three feet, not to exceed that, I could not state; of course where it had been shoveled over, it was a little deeper.

The pile of muck that had fallen from the hanging-wall when I saw it on the 10th was about ten or twelve feet wide. It was a blackish character. I did not dig into it to determine what it was, as I could see from looking at the top of it what it was.

I don’t think the distance between the foot-wall and the hanging-wall of that stope was over eighteen feet anywhere. I took measurements to determine that in places. Where this accident occurred it is not, because I would measure and look at it more

(Testimony of Homer Wilson.)

often where it was large than where it was not so large. It was not more than eighteen feet at the place where this caved.

“A. Well, at the chute the roof had been shot out so as to give them a little more room there from the foot-wall up to the top of the roof, which [105] was not, of course the hanging-wall proper; that might have been eighteen or twenty feet, I do not think to exceed that.”

The country rock at that mine is schist. The foot-wall many times has a dike on it, a diorite dike, but the hanging-wall is always schist. There is no gouge on the schist wall to speak of; there is a little—well, no, you can't call it a gouge proper, at all. It is a seam between the quartz and the schist. It is a graphitic schist, caused by grinding and rubbing against it.

“Q. And it is safe, is it not?”

“A. Yes it is safer than—oh, it varies.”

It varies from the thickness of your hand to eighteen inches, always dry. The color of the seam or soft spot is black. The schist wall itself is black, but not quite as dark; there is two kinds of schist, graphitic and mica; the mica schist is a shade lighter than the graphitic. Where this cave was it was of that character, graphitic schist, lying right against the other. It lies in slabs. The ore was white quartz carrying two to four per cent sulphides. Those sulphides are iron and lead, galena.

I made no special examination there on the 10th of December of the hanging-wall, but just as I would do

(Testimony of Homer Wilson.)

to see if it looked safe in every part. That was the day after the accident. I looked at it carefully. I have always looked at it carefully, in the face of every drift.

“Q. On the 8th of December, how did you get up to the hanging-wall to examine it?

“A. Oh, I didn’t have to get up to it; you could look at it, throw your light on it, and look at it.

“Q. You didn’t go to it at all? A. No.

“Q. Did you use a sounding-bar on it?

“A. At times, in places.

“Q. Did you on the 8th of December?

“A. In several places, yes, sir.

“Q. On the particular place where this cave occurred? A. No, sir, I did not.

“Q. The only way you examined it on that day was to hold your candle up, was it?

“A. Yes, and look at it.”

The color of the hanging-wall at that time, as shown by my candle, on the 8th of December, was dark, just the same.

“A. It wasn’t all dark; in places where the ore hadn’t been shot out, the ore was there.

“Q. The ore was there. A. Yes.” [106]

When I went into the place of this cave on December 10th, the day after it fell, there were men mucking this particular pile of stuff away. They were working close by there, putting it in the cars which they ran into the chute. Some of it they were throwing back, that is, the waste; they did not run that back, they would throw the waste back. Whatever

(Testimony of Homer Wilson.)

ore there might be in it, they would put that in a car. They had only one car. There were two men working there on the morning of the 10th, both throwing into the same car. When they had filled one car, a man would run that to the chute. I don't think there was another car for the other man to fill when he was running the other car away; sometimes that would be the order of things, but I don't think it was that morning. I didn't see the second car I saw only one. I could not tell you who the men were that were mucking there that morning. I was in the mine, an hour, or such a matter. These men were mucking while I was there that morning, that is, the muckers were all at work; they were not all working at this point, however. Two men were working there. I could not say definitely right where the man named Mack worked with his machine on the 8th.

"I do not know where Mack was working with his machine on the 7th nor on the 6th nor on the 5th. I know he was working but I could not say exactly where. I know where Mack's machine was working on the 10th but I don't know whether Mack was running it. I don't know where the third Piston machine was running on the 8th, nor the 7th, nor the 6th, nor the 5th. I don't know where Porter was working with his machine on the 8th, nor on the 7th, nor on the 6th and 5th. The Waugh drill was working somewhere around this mark 'DR.' I did not notice on the 8th particularly where the muckers were at work."

On the 8th the Waugh drill was working out a little

(Testimony of Homer Wilson.)

beyond the end of the track that ran between the pillars. In answer to Senator Morehouse's question I stated that there had been no caves immediately preceding the 9th of December.

"Q. How long before December 9th had there been a cave in that stope?

"A. Well, I don't know of any having been there.

"Q. In all the time you have been there?

"A. Oh, there has been slabs dropped now and then, [107] but nothing of any great importance; those that did drop dropped out in the ground that had been worked out, chiefly.

"Q. And there had been such slabs sloughing off and dropping, had there, at different times?

"A. Now and again.

"Q. In fact, this schist formation, or a slab-like formation, is liable to slough off, isn't it?

"A. At times, certainly.

"Q. You stated a moment ago, I believe, that the foot-wall was sloping? A. Yes, sir.

"Q. Now just what did you mean by that?

"A. I mean the pitch of the vein, the pitch would vary from ten to fifteen degrees from the horizontal."

The pitch of the vein varied at different places along the vein. Sometimes it would pitch fifteen degrees, sometimes ten degrees and sometimes it would be about flat. It was never entirely flat—always had some pitch to it. Sometimes it pitched upwards a little, a sort of wavey line, there would be high places and low ones.

The piston machines were drilling in the face of

(Testimony of Homer Wilson.)

every drift, that is what they did. The piston machine would go in and drill from the foot-wall up about four or five or six feet, and then the Waugh machine would come back of them, and put the holes up in what was left, you see, and drop it down. What I call "upper"; the Waugh machine was for that purpose, a hammer drill. The piston machine simply drilled breast-holes, cut holes, and lifters. The Waugh machine was used exclusively for drilling uppers. They started on what the distance would run along; they drilled from a point underneath the ore body, after the piston machines had done their work.

The employees were not in the habit of making complaints to me direct; they never did.

"Q. You say they left pillars at different times, in place, to support the hanging-wall; was it your practice to cut those pillars afterwards?

"No, after we would get away so it was safe to take them out, if we were not going back in that ground any more, we would put up some stulls, and take them out; if that were good ore, we would get them out. We would not take out all of them; we left a great many of them; we would not work where it was dangerous to work; if we saw it was dangerous to work we would [108] leave the pillar. Where we did not intend to take them out we reduced the size of those pillars afterwards in some places, we cut them.

"Q. You testified, I believe, Mr. Wilson, that the point of the cave was about twelve feet from the

(Testimony of Homer Wilson.)

nearest pillar, is that right?

“A. Well, I don’t know that I testified to the point of the cave; the point where they were hurt—one was hurt against a pillar, and the other was within ten or twelve feet of the pillar.

“Q. Will you indicate on the map which pillar it is that you mean? (Witness indicates point on map.) Mark it ‘N. P.’ (The point is marked ‘N. P.’ by the witness.)

“Q. Now you testified, if I remember right, that there was another, the farthest pillar away from there was about twenty-three feet, is that right?

“A. Yes.

“Q. Mark that ‘23.’

“A. That is the nearest pillar. (Marks the point indicates as ‘23’ on the map.)

“The COURT.—Q. That was the nearest pillar?

“A. The next nearest pillar. Here is the pillar where one was hurt (indicates); and here is the next nearest pillar, where the other one was; they were both close.

“Mr. MILLER.—Q. Now, what was the diameter of the pillar at twelve feet distance?

“A. Well, I should say it was ten or twelve feet in diameter; it might have been more, but it was at least that.

“Q. What was the diameter of the pillar you have marked 23?

“A. Well, 23 was more of a long pillar; it was probably eight feet in diameter, and twelve or fifteen feet long; it was a longer shape, as shown on the map;

(Testimony of Homer Wilson.)

the other one was round, still it was inclined to be long."

Redirect Examination by Mr. MOREHOUSE.

I have heard that John Keith is at a mine, some fourteen miles from Roseland, California.

Q. What effort have you made to have him here?

Mr. MILLER.—That is immaterial, if your Honor please.

The COURT.—If you do not intend to criticize then the testimony will not be permitted.

"Q. I wish you would explain to the jury, because they may not understand it, the difference in the use of the piston machine and the Waugh machine?

"A. The use?

"Q. Yes.

"A. Well, the piston machine is always used in the breast of your drift; we will imagine, for illustration [109], that that board there is the breast of the drift, and with the piston machine they point their holes so as to get the best results from the holes they put in that breast; some pointed this way, and that way, and different directions, so as to get good results in breaking, that drives the breast ahead. In our mine the ore is of that thickness we cannot take it all down with the piston machine; we have to follow the piston drills, the work they do in breasting it up, with the Waugh machine; and it comes along and puts the uppers in the ore the pistons have drifted along, and they fire that, and that drops down from the hanging-wall.

"Q. When you want to get the ore from the hang-

(Testimony of Homer Wilson.)

ing-wall, you use what machine?

“A. They use the Waugh machine, they are the stopers; the Waugh machine is the stopping machine.

“Q. When the ore body is higher than can be reached by means of the piston machine, after you have broken it down by the piston machine, the Waugh machine is used to reach the higher portion of that ore.

“A. Yes. what is left on the hanging-wall.

“Q. What is left on the hanging-wall?

“A. Yes, sir.

“Q. State to the jury why, when you have used the piston machine, that you are compelled later on to use the Waugh machine.

“A. Simply because the Waugh is the machine that can stope that, and drop the ore down.

“Q. Then, after you have used the piston machine, the hanging-wall still remains there, does it?

“A. The ore on the hanging-wall, certainly; yes, sir.

“Q. And what is the character of that ore, as to tenacity or likelihood of falling?

“A. Well, in our mine that ore is very hard, and it is hard to break it down; it takes special powder to do it, special holes have to be drilled so we can break it, it breaks very hard.

“Q. You cannot knock it down, then, except by the use of the Waugh machine?

“A. Certainly, we have to use a stoper; we can't get it down any other way.

“Q. Then, as I understand you, you bore holes in

(Testimony of Homer Wilson.)

the hanging-wall with the Waugh machine, and put your dynamite in there, and discharge it from the hanging-wall?

“A. The ore on the hanging-wall, yes, sir.

“Q. The ore on the hanging-wall? A. Yes.

“Q. You said you were compelled to do that to be enabled to get the ore loose at all from the hanging-wall? A. Certainly.

“Q. And that is so all through the mine?

“A. Yes, sir.” [110]

Recross-examination by Mr. MILLER.

We had the Holman and Sullivan piston machines. It is possible to drill an upper with one of those machines. You don't drill straight with them. At an incline of about sixty degrees.

“Q. And the Waugh machine you set that up by blocking under it and stringing it out?

“A. Yes, sir.”

“Q. How long drills did you ordinarily use with Waugh machines in doing the work that you have described in answer to Senator Morehouse?

“A. Those drills would vary in length from a foot and a half to five feet, perhaps some longer.”

Mr. MOREHOUSE.—That is all.

[Testimony of George Roper, for Defendant.]

Mr. GEORGE ROPER, called as a witness on behalf of defendant, after being sworn, testified as follows:

Direct Examination by Mr. JARMAN.

My name is George Roper. I am a mining fore-

(Testimony of George Roper.)

man and mining superintendent. I have been engaged in that business all my life, since I was big enough to work. At the present time I am superintendent of the Gold Reward Mining Company, which is located four miles from Roseland, California. I worked for the defendant, the Keane Wonder Mining Company, at the Keane Wonder Mine in Inyo County, California, as foreman of the mine. I know James Cunningham, the plaintiff in this action; he was an employee of the company, working at that mine, while I was there. He was a mucker. I employed him. I worked at that mine about a year, probably a little over. I was working at that mine at the time Mr. Cunningham was injured and recollect it, although I could not give you the date, not within a month by my memory, but I was there. Mr. Porter was supposed to be injured about the same time; he was running a machine. I have been in the mining business practically all my life. I used to be superintendent about seventeen years ago in the Pinmore Mine at Randsburg; and also the King Solomon Mine. I was superintendent there a little over two years. Those mines are located at Randsburg, California. I have also acted as [111] superintendent in other mines; I was superintendent of my own properties that I located, after that, at Mohave; and I was foreman at the Ex Post Treasure Mine; and also at the Echo Mine, also at Mohave. I was born on January 9, 1864. I tended a trap-door in a coal mine when I was nine years old and have been working

(Testimony of George Roper.)

ever since in and about mines. I started tending a trap-door and from that I acted as mine foreman and mine superintendent and have owned and operated my own mines. I know Homer Wilson, the gentleman on the witness-stand a moment ago; he is president and general manager of the Keane Wonder Mine.

“Q. Will you state to the jury what your duties were as mine foreman of the Keane Wonder Mine, during the time you acted as such?

“A. Well, it was the same as any other foreman; I had full charge of the mine; I hired and discharged; and anything that was needed at the mine, I reported it to the superintendent, Mr. Keith.”

I had absolute charge of the actual operations in the mine, in developing and extracting ore.

The two classes of men actually engaged in the blocking out of the ore bodies and extracting the ore from this mine were the miners and the muckers.

I will explain to the jury the duties of the miners about the time the plaintiff was injured. I always made it so the machine-men had a clean set-up; the first thing they did of a morning, the machine-men who is designated as miners, the first thing they set up their machines, and the mucker went and helped each man to set up his machine, so he got it set up quick, because the air was turned on fifteen minutes after starting time, and by the time the air was turned on I wanted the men to get the machines to running, and the muckers take care of the balance of the work. By a clean set-up I mean if I had a

(Testimony of George Roper.)

machine working in this place to-day, and shot here to-night, to-morrow I would have the set-up here, which the muckers would clean to-day; and then to-morrow they would clean up the place that was shot to-day; so he always had a clean place to set up. By that I mean that the ore that had been broken down by the previous shots had been cleared away.

Mr. JARMAN.—Q. Who, if anybody, in the employ of the Keane Wonder [112] Mining Company, made a clean place where the miner or machine-man would have a clean set-up?

A. The muckers.

Q. Please state to the jury the duties required to be performed, and which were actually performed by the muckers in the employ of the Keane Wonder Mining Company during the time you were mine foreman, and particularly at the time the plaintiff in this action was injured.

A. It is the duty of all the muckers under me for to keep the tracks as close up to the works as possible, so as they can fill the car without carrying the muck any distance at all, and to see where there was a stull necessary, they put it in—keep the place timbered up, and keep the track up, look after that.

The machine-man at no time ever carried any muck or handled same. Because it is too expensive for a machine-man; if he had time, he would only throw the muck behind him, it would have to be carried again, and in a mine of that magnitude you can set up a dozen times without removing any

(Testimony of George Roper.)

muck. Some of the ore of the Keane Wonder Mine is pretty good grade and some of it ain't. The machine-men were paid four and a half a day and the muckers four dollars.

"Q. Now, in this mine, speaking in reference to its condition at the time that the plaintiff was injured, were there any pillars supporting the hanging-wall? A. In places.

"Q. There were in places? A. Yes.

"Q. Will you describe to the jury what they consisted of, and what they were?

"A. Stulls and pillars.

"Q. Stulls and pillars? A. Yes, sir.

"Q. Now, some of the gentlemen are not mining men; will you explain what a stull is?

"A. Well, a stull is 6 by 6 timber, or 8 by 8; sometimes we use an 8 by 8, and sometimes a 6 by 6; stand them up and down, and then put a big head board on the top of them, and then wedge it into place, until it was solid.

"Q. So as to support the hanging-wall?

"A. So as to support the hanging-wall, and keep any slab that might be loose up there from coming down.

"Q. Now, who placed the stulls that were placed in the Keane Wonder Mine? A. The muckers.

"Q. The muckers? A. Yes.

"Q. Is there a single stull placed in that mine that was ever placed there by any mining man?

"A. By the machine-man?

"Q. By the machine-man. [113]

(Testimony of George Roper.)

“A. No, sir, not one.”

A. Well, Mr. Perez was about the best mucker I had; and as a rule I had him do some of the timbering; and Matt Dropulich was another one.

Q. These two gentlemen sitting back here (indicating)? A. Those are the two gentlemen.

Q. And they were muckers in the employ of the Keane Wonder Mining Company? A. Yes.

Q. And they are the men who put in the stulls?

A. Yes, sir, the most of them.

Q. In addition to the supports which you have designated as stulls, you have stated there were other supports to the hanging-wall, known as pillars? A. Yes, sir.

Q. State to the jury what you mean by pillars.

A. Well, I used to leave a pillar every place that I thought it was necessary for safety of the men.

Q. Did you leave many pillars in that mine for safety? A. Oh, yes.

Q. I will ask you now to examine this map, marked Defendant's Exhibit “A,” which purports to be a map of the floor space of the fourth level, and of the underground workings of the Keane Wonder Mine, of the condition as it existed at or about the time of the injury to Mr. Cunningham. The entrance tunnel I point out to you as being marked “Entrance T,” meaning entrance tunnel; and I point out to you the track running through the chute—the car-track; and the little switch, and the pillar marked number 23, and another pillar marked “N. P.”; also a track drawn in there, marked

(Testimony of George Roper.)

“W”—drawn in by Mr. Wilson while he was on the witness-stand to-day. Also I call your attention to what purports to be the outline of the face of the ore body as it existed at or about the time of the accident; and I call your attention also to the shaft designated upon the map; also the lower level; and I will ask you if you recognize that generally as being a map of the underground workings of the Keane Wonder Mining Company, as it existed on or about the 9th day of December, 1911?

A. Yes. There should be another track down in here—runs down there (indicating on map); that is what they call the old “Pickey Pokey.”

Q. Now, do you know on this map about the place where the material fell from the hanging-wall, by which it is claimed Mr. Cunningham and Mr. Porter were injured? A. Yes.

Q. Will you indicate on the map that point.

A. Yes, right here, between these two pillars. (Indicating on map.) [114]

Q. At or near the place indicated with a cross?

A. Yes, sir.

Q. That is, between the two pillars which are marked “N. P.” and “23”? A. Yes, sir.

Q. Now, I call your attention to two or three little diagrams on this map, apparently marked with circles, and between pillar 23 and the point marked “Chute,” I call your attention to five circles between those pillars which I have designated, and the chute, and ask you what they represent on that map?

A. Pillars.

(Testimony of George Roper.)

Q. Pillars that were left there to support the hanging-wall? A. Yes, sir.

Q. I call your attention, Mr. Roper, to what is marked in here "Car-track"—is that your understanding? A. Yes, sir.

Q. Running over to the chute?

A. To the chute.

Q. Now, are there any stulls in and about the place where these men were injured at that time?

A. Yes.

Q. Will you indicate to the jury and explain to them where they are, and the number of them?

A. Well, there *much* be eight or nine in a row along this side of the track here. (Indicates on map.)

Q. There must be eight or nine stulls along the side of the track? A. Yes.

Q. That is the side of the track toward the face of the ore body? A. Yes, sir.

Q. Now, who placed those stulls there, if you know?

A. I think Mr. Perez put most of them there.

They are lagged on the inside, up about five feet. In future I intended to fill that all up only in here (indicates); that is the reason I lagged up on the inside; I intended to fill it full, and make a false pillar; so when I got this down in here, I could take all these pillars out; it would make it safe for me to take these pillars out, providing I had another false pillar there; it would be what is known as "gob filler."

(Testimony of George Roper.)

“Q. What was the space between the pillar marked ‘N. P.’ and the ‘stulls’?

“A. Well, not to exceed five feet and a half.

“Q. A space of five feet and a half?

“A. Five feet and a half.

“Q. Now, that space intervening between the pillar marked ‘N. P.’ and the stulls what was that space used for? A. The car-track.

“Q. So the car-track indicated on this map was the car-track between the pillar and the stulls; is that right? A. Yes, sir.

“Q. Were there any other stulls in that mine other than those you have just enumerated?

“A. Oh, yes, there is stulls all [115] over; where the quartz is hanging we don’t need any, but these workings (indicating), there is stulls, you know; and the same over in the pickey-pokey here, and the same down through here there is stulls.

“Q. What, if anything, was used at or about the point of the chute?

“A. Well, there is just two stulls there that held the chute up, is all, and there is a pillar on each side of it.

“Q. State, if you know, the distance between the foot-wall and the hanging-wall at the place where the plaintiff is alleged to have been injured.

“A. Thirteen feet four inches.”

On that day Mr. Porter was supposed to be working right here. (Witness marks the point indicated with a cross.) (The point on the map designated by the witness is marked “XY” by counsel.)

(Testimony of George Roper.)

On the day that the plaintiff was injured, I was in and out of the mine all day long; just before the accident occurred, I was in at the mine about fifteen minutes before that. About that time Mr. Porter's machine was not running, and I went over to see what was the matter with it. I knew this because I could not hear it running. I went around the pillar to where Mr. Porter had his machine set up. I turned the air on, and found it wanted some new rings in it, and I told him to take it off the bar, and take it outside, and I went outside with him and repaired it. He took the machine off the bar.

"Q. And he took the machine off the bar at or about the place indicated on the map as 'XY'?"

"A. Yes, sir.

"Q. Is that a place separate and distinct from the face of the ore bodies, nearest to the place that the plaintiff in this action was injured?"

"A. Entirely.

"Q. And how far away was that, about?"

"A. Well, in a direct line I think it is a little over a hundred feet; to go around the pillar you would have to go, at the lowest calculation, three hundred feet one way, and two hundred feet the other."

On that day when I went up to see Mr. Porter I went around the lower way, about two hundred feet around. After I directed him to take his machine off the bar, he did so, taking it outside to the blacksmith-shop. I accompanied him. Mr. Porter carried the machine outside. The blacksmith-shop is located within about thirty feet of what has been

(Testimony of George Roper.)

designated on the map as the "entrance tunnel." This all occurred about fifteen [116] minutes before the accident. I know this because as soon as we got the machine outside I started to tear it to pieces, and I just took out the set holes, and was taking the head off, when the accident occurred.

"Q. Where was Mr. Porter at that time?

"A. Well, he had gone down to that there pillar; he must have been there or he could not have got hurt."

When Mr. Porter carried his machine outside to the blacksmith-shop, he did not assist in repairing it.

"Q. Did you instruct him, give him any directions at that time?

"A. Well, I told him he may as well go in and tear the bar down, and take powder in with him, and load his holes."

I told Mr. Porter to go in, take down his bar, and load his holes—I referred then to the place where he had been at work, indicated on the map as "XY." I did this because that is all he could do. To the best of my knowledge it must have been about four o'clock. They close at five o'clock. We generally fire about ten minutes before five, when they start to spit the rolls. I directed Mr. Porter to load these holes because there was nothing else for him to do. The magazine where the powder was kept was in that little short cross-cut (indicates on map). (The point indicated by the witness is marked "DYn." on map "A.") We kept powder, fuse and caps in

(Testimony of George Roper.)

that. There was nothing else that Mr. Porter needed on that day in order to load his holes.

“Q. Were there any tools or any appliances, or anything connected with the mine, which Mr. Porter needed to obey the instructions which you had given him on that day, which were located in, at, or near the place where the plaintiff was injured on that day? A. Nothing.

“Q. Is there any reason that you know why Mr. Porter should be down between pillars marked ‘N. P.’ and ‘23,’ at or about the time that the plaintiff was injured? A. None that I know of.

“Q. If he had obeyed your instructions, he would have been at a point marked ‘XY’; is that right?

“A. Yes, sir.

“Q. And at the time of the accident you had Mr. Porter’s machine out in the blacksmith-shop, repairing it? A. Yes, sir.

“At that time I did the repairing of the machines used at the Keane Wonder Mine. I made it my business; there wasn’t enough work to have a machinist, [117] so I repaired them myself. Mr. Porter did nothing to assist me to repair the machine that day, he only took the machine outside. When he had deposited it in the blacksmith-shop, his duties so far as the repair of that machine were concerned were ended. This mine was equipped with certain tools, or implements to work with, the same as there is in any mine.

“A. Well, with picks, shovels, hammers, Waugh drills, Holman drills, bars, and tamping-bars; that

(Testimony of George Roper.)

is, long wooden sticks for to tamp the powder in the holes with; about the same as there is in any other mine, that is all.

“What do you mean when you say bars?”

“A. Long bars of steel, for to bar down the backs.

“Q. Will you state to the jury what you mean by barring down the backs?”

“A. Well, if there is a slab, or anything left on the roof, and if we see a little, we try to get it down with those bars; and if we can't get it down, and think it is dangerous, as a rule we put a stull in it; but we always pull them down, if possible.

“Q. Always pull them down if possible?”

“A. If possible, yes, sir.

“Q. Now, who pulls them down?”

“A. Well, the muckers, of course.”

We kept the stulls we were using at the entrance to the tunnel, as a rule, and sometimes we have two or three inside. On the day the plaintiff was injured, there were stulls for use in that mine which were near and convenient.

“Q. Was there any direction or instruction of any kind, or any rule pertaining to that mine, which would in any way forbid the plaintiff in this case, or any mucker, or any miner employed by the Keane Wonder Mining Company from using a stull and putting it in place if he saw any place where it was needed? A. No, sir.

“Q. You have already testified that you were up through this mine six or seven times at least, daily?”

“A. Yes, sir.

(Testimony of George Roper.)

“Q. While you were there, what did you do?

“A. Well, my main duty was to see that the mine was kept safe—watch the roof; and see that the men did their work.

“Q. And did you fulfill your duties?

“A. To the best of my ability.

“Q. Did you at any time while in the employ of the Keane Wonder Mining Company, and particularly on the 9th day of December, 1911, see anything in the nature of the hanging-wall, or any ore on the hanging-wall, which would indicate to you in any shape, manner or form, that there [118] was any likelihood of the ore falling below, with the possibility of injuring any employee in the mine?

“A. No, sir.”

I know the general character of the ore in that mine; it is known as the bull quartz—very hard; and in about the middle, a little up above the middle, there is a seam that carries a little small part of galena, and that has caused a cleavage, up to that seam we take it out with the piston drills, and then afterwards, why, we take down what is known as the backs—that is the quarts that is left—with the Waugh drill.

“Q. Now, as I understand you, the ore between the foot-wall and the hanging-wall at a distance of about five, or six or seven feet—there is a sort of a seam? A. Yes, sir.

“Q. Or a cleavage? A. A cleavage.

“Q. And the lower part of that ore body you use the piston drills, by putting in the holes, loading

(Testimony of George Roper.)

them, and breaking away the ore below that cleavage? A. Yes, sir.

“Q. And that ore on account of that cleavage is taken out, leaving hanging the ore above?

“A. Yes, sir.”

That was the general character of the ore in the mine during the time I was employed there. After the lower portion of the ore is removed, then the upper body of the ore is removed by using Waugh drills. We drill in that ore; the holes we drill are designated as “uppers.” They are put in there with this Waugh drill, as distinguished from what we call the piston machines.

“Q. Why is it necessary to drill holes in ore on the hanging-wall—why does it not fall down naturally?

“A. You do pretty well to shoot it down; it takes a good many holes; you can’t put those holes above eighteen inches apart; the quartz is very tough; even after you do break it and shoot it sometimes it is almost impossible to bar some of it down; it holds together, you know; it is big, bulky stuff, therefore it is very tough—very tough to break.”

We have broken down the upper portion, that is, the portion on the hanging-wall, with the bar after it has been shot, not before.

“Q. Can you state to the jury what area, if any, or what extent you have removed the lower portion of the ore below that cleavage or seam, allowing the ore on the hanging-wall to remain?

“A. Well, after this [119] accident, I shot a

(Testimony of George Roper.)

place out there larger than this room, without even a pillar at all in it, and left the ore all hanging, and then I drilled a series of holes all the way around, which I can show you on the map there—the block of ground; I drilled a series of holes all the way around it, and after the men went away I went and loaded those holes and blew that thing myself, and that all came down, a little over fifteen hundred tons, at one time, that all came down.

“Q. That was ore that was left on the hanging-wall?

“A. That was ore that we took down with the Waugh drill.

“Q. Before that was taken down of course the ore beneath had been removed? A. All been removed.

“Q. And the miners and muckers were at work under that hanging ore all the time that the lower body of ore was being removed? A. All the time.”

“Q. No, I was referring to the ore that was removed below by the piston machines?

“A. Oh, all the way from six to seven feet.

“Q. From six to seven feet? A. Yes.

“Q. Now, the ore that would remain above that on the hanging-wall, what would be the width generally, as to that?

“A. Well, from three to five feet, but mostly about three; it rolls a little you know.”

The thickness of the ore that remained on this area which I shot down at one time would average possible four feet.

“Q. Will you state to the jury the general size of

(Testimony of George Roper.)

the pillars that would remain standing between the chute and the pillars near the place where the plaintiff was injured?

“A. Well, they were pretty big pillars right there, possibly ten or twelve feet through them.

“Q. Were there any pillars as much as ten or twelve feet through?

“A. Oh, yes, there is some there; those pillars left there now, they are about ten or twelve feet through.”

As to the smallest pillar that was ever left in that mine, for use as a pillar, I cut one down one time to about thirty inches; that is, it broke away to about thirty inches in the center, but at the base, that same pillar at the base is fifteen or twenty feet across.

“Q. What would you say was the average size of the pillar that were [120] allowed to remain in that mine for the protection of the employees?

“A. Oh, they will average up about ten feet.

“Q. Average about ten feet? A. Yes.”

In the immediate vicinity to where plaintiff was injured, between there and the chute, I think there is five or six pillars.

“Q. And were there any pillars near the place where the plaintiff was injured?

“A. Two, right there.

“Q. Were they small or large?

“A. Well, about ten foot.

“Q. Do you know whether those pillars are there now or not? A. Those pillars are there now.”

The pillar that I am referring to now is the pillar next to which Mr. Porter was injured.

(Testimony of George Roper.)

Q. What was the general length of the timbers provided by the company for use in the mine as stulls?

“A. Well, as a rule we used about twelve feet; in some places, right in and around where those pillars are, we used twelve foot stull; and the old pickey-pokey, I used a stull there, the longest stull in the mine was fifteen feet ten inches.”

“MR. JARMAN.—Q. Will you state what you mean by a pickey-pokey in a mine?

“A. This part of the mine here (indicates on map ‘A’), I worked it all out with hand drills.” (The witness marks the place indicated by him on the map with a circle.)

I have already testified that at the time of the accident I was in the blacksmith-shop. I went in the mine that night, after I got the men down the hill, possibly seven o’clock. The first I knew that any one had been injured in the mine that day, I heard the cave from the blacksmith-shop, and I started to go in, and met somebody, I could not tell just who it was, coming out, and they told me that Mr. Cunningham and Mr. Porter had been caught in a cave. I immediately started to get help, and got on the outside of the mine, and inside of a very few minutes we had them outside. I did not go back into the mine at that time where the cave was, but ran out and got old Ben Chambers, and all the men I had on the outside, the blacksmith and all of them.

We got two spring cots, and put them on; and I remember Mr. Cunningham, I got my little boy’s mat-

(Testimony of George Roper.)

tress and bedding, and made a bed and put Mr. [121] Cunningham on it, and we carried him down the grade that way. The next time I went into the mine was the first thing after supper, I should judge it was about seven o'clock. I went to the place where the cave was and found the cave, the stuff that had fell down there, just as it had fallen.

“Q. Will you indicate on the map to the best of your judgment, where that cave was?

A. Yes, right here on this side, between those two pillars. (Indicates on map.)

“Q. Near the point marked on the map there with an ‘X’? A. Yes, sir.

“Q. Now, when you went there and saw this cave and the results of it, describe to the jury exactly what you found there?

“A. Well, I found that some rock had fell down there, 5 feet by 8 by 8 feet long, that is, running to a taper point, and where it broke off the pillar, it was 38 inches thick.

“Q. By your testimony you mean that where it broke off the pillar it was 38 inches thick, and you mean to testify that was up near the pillar?

“A. That was near the pillar, that is where it broke.

“Q. Explain to the jury what you mean by going out to a taper point?

“A. Well, it ran from there out to a wedge point, about five feet out. On a run of slab like that, you see when you have gone through it, and shot off, it would not break square off, it would break off and

(Testimony of George Roper.)

leave a slant, you know.”

At the present time, from the foot-wall right to the top where it fell down, is thirteen feet, four inches.

“Q. Now, the place where it fell from the hanging-wall overhead, did it fall directly down?

“A. Yes, sir.

“Q. Do you know whether or not where it fell directly down was the place where either the plaintiff or Mr. Porter were injured?

“A. Why, Mr. Porter was up again one pillar, and Mr. Cunningham up again the other one; one of the largest lumps that fell rolled over, and rolled on Mr. Cunningham and broke his leg.”

“Mr. JARMAN.—Q. Mr. Roper, where were Mr. Perez and Mr. Cunningham supposed to be at work at or about the time this cave took place in that mine, if you know?”

Mr. MILLER.—That is objected to as incompetent, irrelevant and immaterial in any case. They might show where they were ordered to work, if they were so ordered to work in a particular place, but not where they were [122] supposed to work.

The COURT.—You can show where they were at work, if you wish to.

Mr. JARMAN.—No, I cannot show by this witness where he was actually at work, but I can show by this witness where he should have been at work.

(Argument by counsel.)

Mr. MILLER.—I object on the further ground, if your Honor please, that in this case the evidence concerning Mr. Perez, or concerning Mr. Porter, is im-

(Testimony of George Roper.)

material; this is the case of Cunningham *versus* the Keane Wonder Mining Company. (By direction the reporter reads the last question.)

Mr. JARMAN.—I will withdraw that question as to Mr. Perez, and confine it to Mr. Cunningham. I think it is a proper question.

Mr. MILLER.—We make the same objection on the “supposed to be.”

(The question as amended is read by the reporter as follows: “Q. Mr. Roper, where was Mr. Cunningham supposed to be at work at or about the time this cave took place in that mine, if you know?”)

The COURT.—I will sustain the objection to the question in that form.

I instructed the muckers in the employ of the company as to the place where they should work. On that day I instructed the plaintiff Cunningham, as a mucker, to do and perform certain work in the afternoon at about four o'clock, about the time it is alleged he was injured. I told Mr. Cunningham and showed him and Mr. Perez—put them on the car and showed them the pile of ore that they had to take and muck out, and muck into the chute; one man was supposed to be on one side of the track, and the other on the other, and load that ore in that car, and when they got the car full to run it through between these two pillars where the cave was, and run it down and dump it into that chute; and when they had dumped the car, they would go back and refill it again.

“Q. Can you indicate on this map the place or point where they were required to fill this car?

(Testimony of George Roper.)

"A. Yes, sir.

"Q. Will you do so?

"A. Yes, sir. About here (indicates).

"Q. Just mark that 'car.' (The point indicated by the witness on the map is marked 'car.')

"Q. Now, what is the distance, if you know, from where that car was, where they were supposed to load, to the place where the cave occurred? [123]

"A. Oh, I presume sixty or sixty-five feet."

I saw a car in that mine when I went back that evening; it was a car owned by the company and used by the employees of the company for transporting muck to the chute. That day Mr. Cunningham and Mr. Perez had been using the car I went to look at.

"Q. Did you look at that car? A. Yes, sir.

"Q. When did you look at that car?

"A. As soon as I went in the mine.

"Q. That day? A. That day.

"Q. Where was that car when you went there?

"A. About sixty-five feet from the cave.

"Q. About sixty-five feet from the cave?

"A. Yes, sir.

"Q. Where in the mine in relation to the point you have indicated here and which has been marked 'car'?

"A. That is right there where the car was.

"Q. That is right where the car was?

"A. Yes, sir.

"Q. What was the condition of the car when you found it about 7 o'clock on the night of the day of the accident?

(Testimony of George Roper.)

“A. Well, the car was the same as it always was, about one-third full of quartz.

“Q. About one-third full of quartz?

“A. Yes, sir.

“Q. State what you mean when you say the car was the same as it always was.

“A. Well, in good running condition.

“Q. Was it in running condition?

“A. Certainly.

“Q. Was that car damaged in any way?

“A. No. The car was all right, and about one-third full of quartz.

“Q. On the day of the accident, Mr. Roper, were you or were you not at and about the place where the cave took place in the mine? A. Oh, yes.

“Q. How close were you to it at any time during the day?

“A. Well, I guess I went right at the place, right underneath it, at least six times that day.

“Q. Did you see anything while at this place or about this place, which would indicate to you in any way that there was any danger from a cave from the hanging-wall?

“A. No, sir.”

“Q. Did any one on that day, whether in the employ of the Keane Wonder Mining Company, or otherwise, while you were in the mine, or out of it, or at any time prior thereto, direct your attention to the part which actually caved, as being dangerous?

Mr. MILLER.—“Object, if your Honor please, as incompetent, irrelevant and immaterial under the

(Testimony of George Roper.)

pleadings in this case—the answer of the defendant. There are only two defenses left in the answer. One defense was this was purely accidental and the other that this man was outside the line of [124] his employment; so this question cannot be material.” (Argument.)

“The COURT.—I shall allow the question. If it appeared that the defendant knew that condition, knew that it was dangerous, and allowed these men to go there, the jury would be warranted in giving a very different sum of damages than they would if it appeared that the defendant know nothing about it. I think the knowledge of the defendant of the dangerous condition of the roof is a very material matter.”

“Mr. MILLER.—Will your Honor kindly save us an exception on the ground stated in the objection?”

“The COURT.—The exception may be noted.”

(By direction the reporter reads the last question.)

“A. Not on that day, but before that day Mr. Perez and me tried to bar the thing down with two long bars, but we could not budge it—about two days before the thing fell down.

“Mr. JARMAN.—Q. What effects did you make in endeavoring to bar it down?

“A. Well, we got two long steel bars, and tried our best to pull it down.

“A. And didn’t succeed?

“A. We could not do it; no.

“Q. And why did you cease in your attempts to take it down?

“A. Well, we came to the conclusion there was only

(Testimony of George Roper.)

one way to ever bring it down, and that would be to drill it, and blast it down.

“Q. At that time, when you ceased your labors, state whether or not you considered it safe or unsafe in the position in which it remained?”

“A. We considered it safe.”

“Mr. JARMAN.—Q. What was the method adopted, the usual and customary method, in the Keane Wonder Mine for ascertaining whether or not any ore on the hanging-wall was safe or unsafe?”

“A. Well, if we had any idea—we were all of us looking at it all the time—and if we had any idea anything was unsafe, I would take and get a pick and sound it to see if it was drumming or not, and if it was, and we could find a crack there in it anywhere, we would try to pull it down; otherwise, we would take and put a stull under it for safekeeping.

“Q. When would you put a stull, under what circumstances would you put a stull under the portion?”

“A. Well, it would have to be a little away from a pillar, because if it was drumming right over a joining in a [125] pillar, you know, a pillar was just the same as a stull, it would hold it.”

A stull acts, does the same service in a mine as a pillar, only of course it would be smaller. Those stulls that are in there now alongside of that track, they ain't put in there because that is a bad roof; that roof is good where they are put; those stulls are put in there purposely for to lag up on the inside, and make a pillar there, not because the roof is bad; they ain't there for that purpose, that row of stulls that

(Testimony of George Roper.)

is in there at the present time. They act as an additional protection to the employees engaged in and about that mine, at that place. A pick is the best instrument to use to take care of anything overhead which indicates being drummy; and if it happens to be up above the pick, why get a short piece of steel, a short bar.

“Q. Now, could you have taken down this overhead which you have just referred to, with a pick?

“A. No, you can take down things with a bar that could never begin to budge with a pick, because you can get the leverage on them. We tried it with two bars, and then we couldn’t even get it to stir.

“Q. And you ceased your efforts in taking it down?

“A. Yes.

“Q. For what reason?

“A. Well, because we thought it was impossible for it to fall.

“Q. What employee of the Keane Wonder Mining Company was it whose duty it was to use these bars in an effort, or in taking down any rock in the mine which was on the hanging-wall, and which might prove dangerous to any person in the mine?

“A. The muckers.

“Mr. JARMAN.—Q. Will you explain to the Court and jury why it was the duty of the muckers particularly to attend to that work?

“A. Well, by the time that the hanging-wall was cleaned off, the machine-men was working on this here first layer, and they were away from it entirely. The machine-men in the Keane Wonder Mine didn’t

(Testimony of George Roper.)

do anything only except set up their machines and drill; the muckers had to do all the mucking, and look after the balance of it; when the roof was shot down, the second layer of quartz with a Waugh drill, if there was anything left there, the first thing that the muckers was to do every morning, the first thing they did was to go and bat that down, if there was any left there hanging; that was their duty [126] and after that was all stripped off, if the schist—which was the formation—any of it began to slab, or any signs of it, we would try to bar it down, and if we thought it was a little drumming, we would just take and put a stull in for safekeeping; it was the mucker's duty to do that.

“Q. Did you at any time ever instruct the muckers in the employ of the Keane Wonder Mining Company that such was or was not their duty?

“A. Well, I instructed them all that it was their duty.

“Q. Their duty to do what?

“A. For to get the dirt away and look after their safety—to bar the roof down.

“Q. Now, in reference to the place where this injury occurred in this mine, indicated on map ‘A,’ by a cross, and being at a point near the pillars marked ‘23’ and ‘N. P.,’ will you state to the jury, as your best knowledge on the subject at this time, how long prior to the accident the ore had been taken out? At the point where the rock fell.

“A. At least two months.

“Q. Now, will you state whether or not the line in-

(Testimony of George Roper.)

dicated on this map as a wavy line, and which purports to represent the face of the ore body as it existed on that day, correctly portrays the face of the ore body as it existed at that time, according to the best of your recollection? A. Yes, sir."

Q. What is the distance, if you remember, between the point where Mr. Cunningham was injured and the nearest face of the ore body then standing?

A. The nearest place that I was working at that time would be at least seventy feet. At least that; from that up. The reason why we left this ore projecting out further from another portion of the face of the ore was because it helps hold the roof.

"Well, after I had got it all taken out, all but my pillars, then take and put the false pillar along there, as I told you, and then I could start in and draw the pillars."

When it became necessary to make any repairs to a machine, or any other appliance used in the mine, they would go to my office to make repairs or get supplies. My office was just outside the mine, about thirty feet from the blacksmith-shop. No supplies of any kind were kept in the mine for the repairs to machines—too expensive, they would get lost in the mine, little things like them.

On the day Mr. Cunningham was injured there were no men in the employ of [127] the Keane Wonder Mining Company engaged in working on any pillar in that mine. I had Mr. Porter starting off a new place, up on the old pickey-poke car-track; and the other men was working in the large body of ore.

(Testimony of George Roper.)

There is a large body of ore (indicates on map "A"). This ore which is represented by this wavey line, as being its face, is the body of ore that I refer to.

Tuesday, November 25, 1913.

Court convened 10 A. M. (All parties present.)

Direct Examination of Mr. GEORGE ROPER,
Resumed.

In my judgment, not to exceed five to seven tons of ore fell at the point which has been designated as the cave. There was a little quartz mixed in with it, but it was chiefly schist. The next morning I had it throwed over behind the lagging. They started to work at seven o'clock the next morning on that body of rock or ore.

"Q. Do you recollect who you put to work there?

"A. I put my muckers to work; Mr. Perez would be one of them, and Louis Guerra, and his brother; I believe the four muckers that was on that shift; anyhow they would be the ones I put to work to move it.

"Q. Part of that stuff you say was put over behind the lagging? A. Yes, most of it.

"Q. Do you recollect what was done with the rest of it?

"A. Just put it to one side, so we could get the cars by and then put it in the cars, and put it in the chute."

I had to move it so as I could get my two cars by, so as I could get the ore out of the face, to keep the mill going, and I only had the two cars in the mine at that time. "The cave was between the two cars and the chute."

(Testimony of George Roper.)

There was only two cars there that was used for transporting ore in that section of the mine; down below there was another car in the same mine, but it was away down below where Mr. Porter had been previously working, for months previous to this; but that was working on waste; I tried to find another body of ore. These two cars was the only two cars that was transporting ore for the mill. On December 9th, 1911, Mr. Perez and Mr. Cunningham were using one of them and I believe Louis [128] Guerra and his brother, the other. As I have already stated I was in and about that mine during that day and saw Mr. Cunningham and Mr. Perez working there that afternoon. I know where they were working and I know where they were directed to work as I directed them. I will state to the Court and jury the place that I directed them to work.

“A. Yes, sir; I can show it on the map.

“Q. Will you kindly do so?

“A. Right here (indicating on map ‘A’).

“Q. At the point which is marked ‘car’?

“A. Yes, sir.

“Q. Did you see Mr. Cunningham and Mr. Perez working in the mine on that afternoon?

“A. Yes, sir.

“Q. State to the Court and jury the point that you saw them at work. A. Right at that car.

“Q. Right at the point which is indicated on the map as ‘car’? A. Yes, sir.

“Q. How far, if you know, is that point from the place where the cave actually fell?

(Testimony of George Roper.)

“A. Sixty-five feet.

“Q. How do you know that it is sixty-five feet?

“A. Because I measured that thing the first thing the following morning, to find out exactly.”

“Q. Did you on the 9th day of December, and particularly at any time during the afternoon of that day, direct or instruct the plaintiff in this action to do any work as a mucker in that mine at the point where this cave took place? A. No, sir.

“Q. Was there anything there for him to do?

“A. No, sir.

“Q. How long previous to the 9th day of December, 1911, had there been mining at or about that point?

“A. Well, at the lowest calculation, that work was done there at least two months before that.”

Q. From the time, which according to your best judgment you say is two months prior to that time, state whether or not mining operations were conducted on the ore body moving forward?

A. All the time.

No work had been done at or about that point in the way of mining operations for at least two months. After the period of time which I have designated as two months prior, at least two months prior to December 9th, I took out about a hundred tons of ore, from ninety to one hundred tons of ore, daily, out of that body of ore, and half of it came through between those pillars, and half of it straight ahead. I always managed to have one machine on one side and one on the other, so as I could have two men tramming from

(Testimony of George Roper.)

one of the tracks, and two men tramping from the other. [129]

“Q. Do you mean by that that it came through the pillars in cars?

“A. In cars, yes, sir. On the track which is designated as the main track there was one car transporting ore to the chute. I always made arrangements for two men to be on the car here, and two men to be through between these pillars in here (indicates on map ‘A’); while these here men was filling this car, this car was running to the chute and dumping it in; and when they were coming back, these men would be the next ones to take their car out; I always had one machine at this point, and one over here, breaking or all the time; and sometimes three machines in this radius in here; this was a solid body of ore I was working on at that time, and this track started here, and we worked to this point.

“Mr. JARMAN.—In order that the record might be identified so as to distinguish the two tracks; one track is the main track, and the other track referred to by the witness is designated on the map as the Wilson track, and is marked ‘W.’ Is not that right, Mr. Miller?

“That is the track Mr. Wilson drew on the map.”

Previous to this cave, not to exceed fifteen to twenty minutes at the outside, I was in the mine. I was around where Mr. Perez and Mr. Cunningham was working, and also Louis Guerra; I went right through the place where the cave happened, went around, and I had to go around that there block of

(Testimony of George Roper.)

ground to the right, to get around to where Mr. Porter was working; his machine had broke down, it wasn't running, and I went up there to see what was the matter with him. If it had been running, I would have heard it, but I heard no sound. When I noticed there was no sound coming from the position where Mr. Porter was supposed to be working, I was around where Mr. Perez and them was working and saw them. They were shovelling the ore in that car. The car was at the place where it is marked "Car." That was sixty-five feet from the cave.

"Q. State to the Court and jury the condition of the mine at the actual place where you saw Mr. Cunningham and Mr. Perez at work with reference to the ore?

"A. Well, at the place where they was shovelling, there was only a part of the ore taken out.

"Q. What part was that?

"A. Well, the lower part, or ranging all the way from six to seven feet—the upper [130] part was all left yet.

"Q. The upper part was left?

"A. Yes, they had not shot that down; that was the part that we shot down later with the Waugh drills.

"Q. So that the point where the plaintiff and Mr. Perez were working the last time you saw them on the afternoon of the day the accident occurred, was at or near the point indicated on the map and marked 'Car'?

A. Yes, sir."

(Testimony of George Roper.)

“Q. And they were working under that ore which was then remaining on the hanging-wall?

“A. Yes, sir.

“Q. Did you ever have any conversation with the plaintiff, Cunningham, in reference to his employment with the Keane Wonder Mining Company?

“A. Yes, sir.”

“Mr. JARMAN.—Q. You may state to the Court and jury what that conversation was; state just exactly what Mr. Cunningham said to you, as near as you can remember.

“A. Mr. Cunningham asked me for to give him the next machine; I asked him if he could run one, he said he could run one as good as any man in the mine. ‘Well, then,’ I says, ‘I will give you the next machine.’

“Mr. MILLER.—If your Honor please, I move to strike out the testimony as being incompetent, irrelevant and immaterial, going to no issue in this case, and contradicting no statement of the plaintiff whatever; he said he was a mucker, and did the work of a mucker at the time he was injured, and all the time before.”

“The COURT.—Do you contend that he knows nothing except mucking?”

Mr. MILLER.—“A. So far as his work is concerned, no. His testimony is that he did nothing but mucking; that stands uncontradicted. Now, if he asked Mr. Roper for a job as machine-man, how does that affect the question, unless he had a machine-

(Testimony of George Roper.)

man's duties to perform on the day of the injury? I don't know how it is material at all."

Mr. JARMAN.—"From our standpoint it is material to show by this man's own words that he represented to the defendant that he was a miner; and that, as a matter of fact, he was the next man in line for a machine in that mine."

(Argument.)

"The COURT.—I will deny the motion. It seems to me if a man goes in a mine who is utterly ignorant, and another one goes in to do the same sort [131] of work, who is a thoroughly experienced miner, that fact would have a decided bearing on the question of comparative negligence, and for that reason I shall deny the motion."

"Mr. MILLER.—I desire to save an exception on the grounds stated in the objection."

The Whip Saw is another mining claim about half a mile away from this one, which the Keane Wonder Mining Company was operating at that time. I did not state to the plaintiff on that day that I was going over to the Whip Saw, because I would not tell anybody if I was going over to the Whip Saw that I was going. I would not want any man in that mine to know I was away from it; I would not want them to know I was going over to the Whip Saw; I would not tell any man that; you know how men are, if the boss is away and they know he is away, they are liable to lay down a little on him. Naturally, I would not tell him I was going over to the Whip Saw.

"Q. Now, for what distance, or what radius from

(Testimony of George Roper.)

that point will that measurement hold true?

“A. At least two acres.

“Q. At least two acres? A. Yes, sir.

“Q. Around and about that place, the distance between the walls is about thirteen feet four inches?

“A. Yes, that is the highest point, and the cave made that the highest point; that is how it comes to be that high. As a rule, we used to put twelve-foot stulls in that section; that row of stulls, there is none of them over about twelve feet in length.”

The gauge of the track used in that mine at that time was eighteen inches. I was at no time on December 9th, 1911, engaged in any work on the track or any switch at or near the point of the cave. The track and switch at that point had been in place and in use and operation at least two months at the time of the cave. On that day there was no work done by me on the tracks or directed to be done that I remember. I always laid the switches on the tracks myself. If Mr. Perez was around I would get him to help me, because he was a very handy man. I never had anyone else to assist me other than Mr. Perez for several months. On December 9th, 1911, I did not direct the plaintiff in this action to do anything in reference to the [132] laying of rails or moving of the car-track.

“Q. Was there any necessity, or was there any reason, if you know, why anything should be done with the track at the point where the cave took place?

(Testimony of George Roper.)

“A. There was no necessity for doing anything there.

“Q. State, if you can, any reason that you know of why the plaintiff in this action should have been at the point where the cave took place at the time it did? A. There was no reason whatsoever.

“Q. Where should he have been at that time, if you know?

“A. At the place marked ‘Car’ on the track, helping Mr. Perez to fill.”

Every time the car was filled it was the plaintiff’s duty to run right through between those pillars, and dump the car in the chute, and then take it back again. It was his duty to do that continuously all day long. The plaintiff did not do that work alone; Mr. Perez would run one car out on time, and then Mr. Cunningham would run the next car out; that was their duty, to run every car; just one man went out with the car after they got it loaded. While one man was taking out the car the other one would taper off for a few minutes until the car came back again. He would have a few minutes rest. As I stated, the next morning I went into the mine about seven o’clock; very nearly every man I had working for me in the mine accompanied me at that time.

“Q. And what was the first thing you did on entering the mine at or about the place where the cave took place at that time?

“A. Went over, found out and looked at the exact places where the men got caught.”

I had the men that took them out show me the

(Testimony of George Roper.)

exact places where the men got caught. The men who showed me were Louis Guerra and Mr. Perez and others; there was half a dozen of them. They went with me. There may have been two others with me that were working in that section of the country. There were at least a dozen men there at that time looking at the place where the cave took place. There was a miner named Ed. Williams there. He is the man sitting in the courtroom back there (indicating).

“Q. Now, will you indicate on this map the point which Mr. Perez and Mr. Guerra pointed out to you as being the place where Mr. Cunningham was injured? A. Yes, sir.

“Q. Will you do so?

“A. Mr. Cunningham was caught [133] up against this pillar at this point (indicating on map ‘A’); and Mr. Porter up against this one at this point (indicates).

“Q. To identify them—

“A. Cunningham here (indicating).

“Q. Next to the pillar— A. Marked ‘N. P.’

“Q. And Porter against the pillar marked—

“A. ‘23.’

“Q. The points which were indicated by the men you have just named as being the points where Mr. Cunningham and Mr. Porter were injured?

“A. Yes.

“Q. Now, how far were those points from each of the pillars which you have pointed out on the map?

“A. Why, they were up against each pillar.

(Testimony of George Roper.)

“Q. Right up against each pillar? A. Yes, sir.

“Q. Now, how far were these two positions which were pointed out to you apart?

“A. Not to exceed eight feet.

“Q. Not to exceed eight feet? A. No.”

Q. Will you state to the Court and jury the duty of the miners employed in the Keane Wonder Mine—what their duties were?

“A. Well, the men designated as miners, that was the machine-men, their duty was for to get them cleaned out, and if there was any loose above them, their first duty was to look at that, and then get the machine up as quick as possible, and then run the machine all day.”

“A. Well, if there was a little loose stuff above the roof, of course they would pick it down, and make it safe for themselves, and when they got their own place safe they would set their machine up, and go ahead and drill.”

“A. Any place they was working in, it made no difference where it was, it was a man’s duty to see that it was safe over his head—that is, any miner’s duty.

“Q. Was there any reason, and is there any reason existing, why it became and was the duty of the miners and machine-men employed by the Keane Wonder Mining Company to devote as much time of their shift as possible in their particular line of work? A. Yes, certainly there was a reason.”

“Mr. JARMAN.—Q. Will you state to the Court and jury those reasons, what they were at that time?

(Testimony of George Roper.)

“A. Well, in the first place, at 7:15 we started the compressor going, and that used to cost us about twenty-five dollars a day for fuel alone, to run it; therefore it became absolutely [134] necessary, as soon as ever the air came up, got up to the mine, we tried for to get all of the machines set up, so we could start work right away; I expected every machine to be started and running; some of them didn't get started, but I always looked for them to be running at half-past seven of a morning.”

A good man right there could set up a machine and be ready for work in from twenty to thirty minutes. The reason for the cost of running the compressor at this time was, our distillate at that time used to cost about twenty-three to twenty-five cents a gallon, by the time that was delivered into Death Valley. By wagon road the mine is twenty-eight miles from transportation. We have paid as high as two cents per pound for wagon transportation; at that particular time I think we got it for about a cent and three-quarters. At that time we had five machines in the mine; but I didn't always run the five. When Mr. Cunningham was injured there were three machines running in that mine and one over on the Whip Saw. After the ore was taken out of the mine it was sent down the tramway to the mill, and crushed. The Keane Wonder Mining Company operated a mill in conjunction with this mine at that time. The ore that was taken out was transported to the mill. At the beginning of the month, after we put new shoes and dies on, we would crush a hundred tons a day;

(Testimony of George Roper.)

and at the latter part of the month, when the shoes began to wear out a little, we have gone down as low as eighty tons a day.

About the time of the injury to the plaintiff, the quantity of ore that was necessary to be transported to the mill was possibly ninety tons, or ninety-five.

Cross-examination by Mr. MILLER.

Q. "I wish you would step to the blackboard for a moment. Directing your attention to Defendant's Exhibit 'B,' I wish you would take this ruler, and give me the distance between the two wavy lines of the yellow ore body, between the perpendicular line 500 and the perpendicular line 600, at a point which I will mark '1'—give the distance between those two wavy lines. [135]

"A. Well, it shows a half inch on the ruler.

"Q. A half inch on the ruler; very good. Now, directing your attention to Defendant's Exhibit 'A,' I wish you would take the ruler, and give us the distance from the point of the switch, where the switch leaves the main track, or car-track, to the chute?

(Witness measures on map 'A.')

"A. Now, do I understand this—is this here the chute that goes down the upraise?

"Q. Yes, that is the chute from which this ore was carried down. From the edge of the chute—which is the length of the track—to the point where the switch leaves the main track?

"A. Four inches and a half."

"Q. Now, I would like you to take the distance on

(Testimony of George Roper.)

the ruler from the point of the switch to the end of the switch-track—this labelled 'switch-track,' you see, from the point of the switch to the end of the switch-track.

"A. (After measuring.) That is one and one-quarter inches there.

"The COURT.—Which track?

"A. That is the track straight in.

"Q. It is not the one Mr. Wilson put in?

"Mr. MILLER.—No, not the one Mr. Wilson put in.

"Q. Now, will you measure the distance on the ruler between the nearest edges of pillar '23' and pillar 'N. P.'? A. The nearest points?

"Q. Yes.

"A. (Measures.) Well, it is five-eighths of an inch.

"Q. Now, will you measure the distance, giving the ruler figures, between the point marked 'Car,' and the switch where the switch-track joins the main track, between the car and the switch point, where it joins the main track? (Witness measures.)

"A. Three and a quarter inches.

"Q. Now, will you give us the distance on the ruler between the end of the track marked 'Switch' and the figures 'M. X.'?

"A. (Measuring.) Two inches."

"Q. I don't desire to have that marked, unless counsel wishes it; that is immaterial. I will ask you to state if on the 9th day of December, 1911, there was any other car-track running down to any other

(Testimony of George Roper.)

chute than the one which is now shown on the map.

“A. Not at that time; no, sir.

“Q. Not at that time? A. No, sir.

“Q. Was there any other chute at that time, other than the one which is marked on the map, to which the track [136] is running? A. Yes, sir.

“Q. Where was it? Please indicate it on the map.

“A. Well, directly up above this here; that must have been about there (indicates).

“(Witness marks the point ‘Chute-2’ on map ‘A.’)

“Q. Was there any car-track running to chute-2?

“A. There was a car-track, but there was no car there.

“Q. What direction did the car-track run from the chute-2?

“A. Into this section here. (Indicates.)

“Q. Into the pickey-poke part?

“A. The lower part of the pickey-poke; in this side of the other ridge there.

“Q. Was there any other chute from that entire level on the 9th day of December, 1911, other than the two that are now marked on the map?

“A. No, sir.

“Q. Is it not a fact that on the 9th day of December, 1911, there was a car-track running from this track here indicated, running through the first chute, which took the muck away from the point marked on the map ‘P. X.’? A. No.

“Q. You will please take the ruler now, and measure the distance on the ruler, the nearest distance between the fact of the ore body at ‘P. X.’ and the

(Testimony of George Roper.)

track that is indicated.

“A. The nearest face to the ore body?

“Q. The nearest face marked ‘P. X.’ to the nearest point on the track.

“A. (After measuring.) One and three-quarter inches.

“Q. Mr. Roper, will you examine that map and tell what the scale is? Map ‘A.’

“A. Why, it looks as though it is twenty feet to the inch.

“Mr. MILLER.—Q. Then one and three-quarter inches would be thirty-five feet, would it not?

“A. That is what it would be.

“Q. Then if there was muck taken down at the point marked ‘P. X,’ and the track was thirty-five feet away, the muckers would have to pack that thirty-five feet, wouldn’t they?

“A. Ah, but that track wasn’t thirty-five feet away.

“Q. Then the map is not correct, is it?

“A. No, sir, that track should be right up to the face.

“Q. That is what I wanted to get at a long while ago. Then this track marked ‘Switch’ is not accurately placed on this map, is it?

“A. No, sir, it is not.

“Q. As a matter of fact, it did run more to the right, up to the point marked ‘P. X’?

“A. No, it ought to run up to this point, that was run along to this side; here is where I was working at that time; I was after this body of ore (indicating

(Testimony of George Roper.)

on map); this track ran alongside—this is all solid ore—that track ran up [137] alongside right in that direction (indicates). This track ran up to this point at that time.

“Q. This point is marked on the map ‘M. X.’ If that be the fact, there was no machine, and no work being done at ‘P. X.’ on December 9th, was there?

“A. No, sir, there was not.

“Mr. MILLER.—Q. I want to direct your attention to this track that is marked ‘W,’ coming from the main track between the pillars, and ask you to examine it carefully first. Now, I will ask you to state whether that track as shown there, track ‘W,’ is a correct representation of that track?

“A. Well, the track came through between those pillars, came over here to this place here (indicates.)

“Q. Then the map does not show the whole length of that track, does it? A. No.

“Q. You stated, Mr. Roper, on direct examination, that you had full charge of the Keane Wonder Mine during the time you were foreman, and of the men? A. Yes, sir.

“Q. Did you have any assistant foreman or shift-boss?

“A. Well, not just at that time, I didn’t have any.

“Q. You mean on the 9th of December, 1911?

“A. Yes.

“Q. Did you work a night shift at that time?

“A. Yes, sir.

“Q. How many men did you work on night shift?

“A. Four men.

(Testimony of George Roper.)

“Q. What were their duties?

“A. Mucking.

“Q. No machine-men on the night shift?

“A. No, sir.

“Q. You have stated on your direct testimony, Mr. Roper, that the machine-men had to set up their machines quick, and that it took about twenty minutes or such a matter, for a machine-man to set up?

“A. Yes.

“Q. And I understood you to say that the machine-man's duty was to pick or bar down whatever loose stuff there was, before he set up his machine?

“A. Right over his own head, certainly. On those piston machines we used the post with the arm on it,—the perpendicular bar. We never set those piston machines on a horizontal bar, in that level.

“Q. And the machine-men had to pick down over his head, and I presume he had to pick down the face where he was to drill, to get a free place to drill against, didn't he? A. Certainly.

“Q. And he had to make a firm place to set his bar? A. Certainly.

“Q. And he cleared out a little place for himself to stand, didn't he?

“A. Well, the reason that I had muckers mucking of a night was to do that work, and clean up—always had a clean place to set up; of course when the machine-man went, he would take [138] and sound on the roof above him, and if there was any loose, he would tear it down; and he would do that for his

(Testimony of George Roper.)

own protection; and if he thought there was any loose in the face, he would pick it down, but as a rule that was all done before he went there.

“Q. You mean you instructed the night muckers to clear out a place at the face?

“A. Yes, as a rule that is always done.

“Q. You say the machine-man would sound to see if there were any loose slabs, or anything?

“A. Certainly.

“Q. And if there was a slab that looked as if it was loose, and he sounded it, would that always sound drummy? A. It would if it was loose.

“Q. It would if it was loose? A. Yes.

“Q. No matter how thick it was?

“A. Well, you might get rock maybe fifty feet thick, you know, and if it was it would not sound drummy, it would be too thick; but anything up to the medium thickness, less than five or six feet, it will sound drummy; if it is loose you can always tell.

“Q. And how far from the car-track do you say the nearest side of your proposed false pillar was?

“A. Well, those posts are put in, none of them within a foot of the track.

“Q. None within a foot?

“A. No, a foot to eighteen inches from the track.

“Q. What men put in those stulls and lagging, if you know?

“A. Why, I believe Mr. Perez put in pretty near every one of them, and whoever was his partner at the time; he always had a partner. I gave him his partner. That partner would be a mucker, too, like

(Testimony of George Roper.)

Mr. Perez. Mr. Perez was hired as a mucker; his wages were four dollars a day. I had no timber-man in that mine. If I had a regular timber-man I would pay him the same as a miner, that is, four dollars and a half a day.

"I don't remember, of my own personal knowledge, what day of the month, or what day of the week, this cave occurred. I remember that it was the month of December, of my own independent personal knowledge. I was in the blacksmith-shop at the time this cave occurred. I heard the crash.

"Q. At the time you went in in the evening about 7 o'clock, how long did you stay on that level?

"A. Oh, I possibly was in the mine fifteen or twenty minutes.

"Q. Were any muckers working that night?

"A. There was nobody working that night.

"Q. Nobody at all? A. No."

At that time we had to get out about ninety or ninety-five tons daily in [139] order to keep the mill running.

"Q. And, as a matter of fact, you mucked out pretty clean, didn't you, in order to get that muck ore?

"A. No, I always had a few hundred tons they were working on. Always had a few hundred tons of ore broken down ahead. On the 9th of December, 1911, we had lots of ore broken down ahead, scattered around in different places. The machines would go on ahead of that muck.

"Q. And then when you were mucking, you didn't

(Testimony of George Roper.)

muck close up to the machines, but you would muck on the reserve ore somewhat, wouldn't you?

"A. Well, I can describe exactly with some books, if you will allow me to do it, just how I did it.

"Q. Yes, I will allow you.

"A. Now, I would have a machine set up one day, and shoot this part (illustrating with books); and then the next day would shoot this off; and then the next day he would come back here; and then the next day back here, the same; and keep going around, all around those; and then when I would get where I was going to leave a pillar, I would cut through and leave the pillar; so I always had the muckers working a little away from the machine-man; and they would swing that track around for to keep up, so as they would keep the dirt close to them, but always kept it up to the face; and we had short rails there, eight feet in length, and when there was room to put an eight-foot rail in, they would put it in; and if there was room for a sixteen-foot rail, they would take the eight-foot out, and put the sixteen in; that was the mucker's duty; but when there was switches, or anything like that, I put them in myself.

"Q. So the muckers did not follow the machines closely, but were behind them on the face?

"A. Always near enough to make a clean place; and that is the reason it always gave a clean place for the machine-men to set up.

"Q. What was the distance, approximately, Mr. Roper, from the blacksmith-shop, through the nearest way you could go in through the mine, to the

(Testimony of George Roper.)

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(Testimony of George Roper.)

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"Q. What was the distance, approximately, Mr. Roper, from the blacksmith-shop, through the nearest way you could go in through the mine, to the

(Testimony of George Roper.)

place where the cave occurred?

“A. Thirty feet.

“Q. From the blacksmith-shop clear in to where the cave occurred, by the nearest route you could follow, what was the distance?

“A. By the regular way, down the steps, was the nearest way; there was another way by going around by the old pickey-poke. [140] It would be, possibly, six hundred feet.

“Q. And they went off shift when?

“A. Whenever the shooting time was; either four-thirty or five o'clock, I don't just remember; four-thirty, I believe. They worked eight-hour shifts.

“Q. Now, I understood you to say in answer to a question of Mr. Jarman's, there never had been any caving in that level before?

“A. Not in the level before, no, sir; not during the time that I was there.

“Q. Well, that is what I refer to, to your knowledge. A. Yes.

“Q. And how long were you there before December 9th, 1911?

“A. Oh, possibly ten or eleven months.

“Q. Ten or eleven months; during that ten or eleven months do you know of any slabs having fallen off or sloughed off the hanging-wall anywhere on that level?

“A. Well, I pulled several of them down; those were the only ones we barred down.

“Q. Do you know of any having sloughed off, without having been helped with human agency?

(Testimony of George Roper.)

“A. No.

“Q. Nothing at all.

“Q. You were thoroughly familiar with everything that happened in that stope during that ten or eleven months, weren't you? A. I was.

“The general system we pursued was stoping out up to the galena seam and then using the Waugh drills and breaking down the remainder. On one occasion I broke down at least 1,500 tons at one round of shots, but generally not as much as that.”

Q. Now, during the ten or eleven months you were foreman, and thoroughly familiar with the work going on in that level of the mine, do you ever remember, or was there ever any ore left on the hanging-wall after the use of the Waugh drills—after the Waugh drills had been used?

A. No, we took it all down if we could, if possible.

Q. In each and every instance when you shot the holes drilled by the Waugh drills in an ore-body above the seam, and hanging upon the hanging-wall, did those shots in every instance during that ten or eleven months break clean all the ore from the hanging-wall? A. Good Lord, no.

Q. As a matter of fact, then, after the shooting of the holes drilled by the Waugh drills, there would be ore bodies remaining, unbroken, from the hanging-wall at times? A. At times, yes.

Q. And those you got down by barring?

A. By barring, yes. [141]

Q. And if the ore was not of very high grade at that point, and the amount of ore remaining upon

(Testimony of George Roper.)

the hanging-wall was not large in quantity, did you always go to the pains of getting that down?

A. Always got it down. We didn't always get it down immediately after we had shot the holes drilled by the Waugh drills; sometimes we would have to drill them again. Wherever the Waugh drills had been shot, the muckers that went on night shift would bar all down that was possible to bar down.

"Q. Now, was it or was it not your practice to draw pillars wherever you could do so?

"A. To do what?"

"Q. To draw the pillars wherever you could do so."

"A. Well, it would have been but I never did draw any of them."

"Q. You never did draw any of them?"

"A. No—I will take that back; I did draw one pillar in the pickey-poke."

"Q. And did you not as a matter of fact reduce the size of some pillars after you advanced a considerable ways beyond them?"

"A. Yes, two or three pillars I took them down."

I did draw one pillar in the pickey-poke. I reduced the size of two or three pillars, after I advanced a considerable ways beyond them. Mr. Grimini tells me that the two pillars near the point of caving are there now, and he had just come from there a week or so. I have not been there since March, 1912. The distance between the foot and hanging-wall at the point of caving was 13 feet 4 inches. I measured it at that time, and they say there

(Testimony of George Roper.)

is no more fell down than there was at that time. On that level, right there at that point, twelve-foot stulls they used. The longest stull I used was on that pickey-poke; I put a stull in there one time fifteen feet ten inches long. I never blocked them up from the bottom; you dig a little hole in the bottom, if possible, for to keep the bottom from moving, and then put a head-board on. As a rule we used 6 by 6 for head-board. We put in the wedging on top of that. It would require thirteen cubic feet of the schist hanging-wall to make a ton. I believe that twelve cubic feet of that quartz ore would make a ton. The first time I remember having seen Mr. Cunningham on the 9th day of December, 1911, inside the mine, would be the first time I went in, about five or ten minutes past seven in the morning. I gave Mr. Cunningham no instructions as to his work [142] at that time. The next time I saw Mr. Cunningham,—would be about 8:30 or 9 o'clock. That was my regular time for making my rounds; I would see him every time I went around. He would be at his work there at that time, certainly. I could not swear that I saw him, but if he had not been there I would have made inquiries where he was, and there would have had to have been some explanation, because, if I found a man away from his duty, I never give them a chance to find them the second time.

“Q. You would can him, wouldn't you?

“A. I did.”

The last time I was in the mine I remember of seeing Mr. Cunningham. That was just as I left him

(Testimony of George Roper.)

to go over to Mr. Porter's place. I showed Mr. Cunningham and Mr. Perez a certain pile of ore to car, and one was on one side of the track, and one on the other. At that particular point at that time, the ore laid on both sides of the track. This here track was up in here; here is where the other two men was working; Mr. Cunningham and Mr. Perez came through this here pillar here (indicates), and here is where they were working.

"Q. Will you indicate on the map by the words 'Car-2,' where the other car would be loaded?

"A. There (indicates, and marks point 'Car-2')."

I used to go in the level from six to ten times every day. The day of the cave, I was in that level just my regular custom, same as any other day. As a rule I made one or two trips a day over to the Whip Saw; it is half a mile from the other place.

"Q. Now, what day was it that you tried to bar down the slab at the place of the cave?

"A. Well, it was just about two days before it fell down.

"Q. Two days before? A. Yes, sir.

"Q. Did someone call your attention to it at that time? A. Yes.

"Q. Who? A. Mr. Perez.

"Q. What was the distance from the outer edge of the muck that fell in the cave to the nearest face of ore, other than the pillar '23' or 'NP'?

"A. Well, at that time not fifteen feet.

"Q. Not fifteen feet? A. No.

"Q. Was it as much as ten feet? A. Oh, yes."

(Testimony of George Roper.)

All the accessories to the machines were kept out there at my office. Nothing whatever was kept in the mine. No bolts; no nuts; nothing that attached to or applied to the machine was kept in the mine. The bolts was kept in the blacksmith-shop; all the other material was kept in the office. [143] When the machine is in place there are no repairs of any kind belonging to the machines kept in the mine, because there was no place to put them; and they are expensive, and have to be taken care of. If a man broke a bolt he would have to go out to my office to get another,—about six hundred feet away from the stope.

There was no ore being carried to any other chute than the one here indicated, on the 9th of December, 1911. No ore had been taken to any other chute on December 8th,—not for a month or more before that. There was no other ore broken down at any place on that level on the 9th of December, except along this face I have described, and as having the machines at work. There was no ore broken down from any of these pillars. There was no ore dumped into the chute at the end of the main track on the 9th of December, 1911, that did not come from the face of the ore body, up here where the machines were placed.

“Q. Then I understand you to say that the caved stuff covered both tracks?

“A. Oh, yes, it came right down on the switch.

“Q. Right down on the switch? A. Yes, sir.

“Q. What size were those cars, Mr. Roper?

(Testimony of George Roper.)

“A. Twelve hundred and fifty pounds.”

They are made out of steel, about—possibly three-eighths. One of them is a Truax car. One man would take about ten tons of muck out in eight hours; four men would take out about forty tons. We kept the rails for the track on the level in the mine; they were all over the mine. They were laid on cross-ties; the cross-ties were kept around the mine, too. They were fastened with fish-plates. They were fastened to the cross-ties with spikes; and they were kept around the mine too. My general instructions to the muckers were to put in a length of rails whenever they made room for it. They did that whether I was there or not.

“Q. I would like to have you particularly look at the position of pillar ‘23’ and pillar ‘NP,’ and I call your attention to track ‘W,’ the ‘switch-track,’ and the place marked ‘NX,’ and the place marked ‘PX’ on the map, and I will ask you to state whether the position of the pillars ‘23’ and ‘NP’ is correctly designated and placed on that map ‘A’?”

“A. Yes, those pillars belong just about where they are.

“Q. Just about where they are?”

“A. Yes, sir.” [144]

Redirect Examination of Mr. GEORGE ROPER by
Mr. JARMAN.

“Q. Mr. Roper, will you explain what you meant when you answered that there was, in your judgment, twelve cubic feet of ore to a ton?”

“A. Well, in place—before it is shot down. It is

(Testimony of George Roper.)

the same as to the schist; in place, not the stuff broken down,—about thirteen cubic feet to a ton. In a straight line the distance from the point of the cave to the blacksmith-shop, or the place that we kept the supplies, just outside the entrance to the tunnel, would be about three hundred feet. I knew there had been a cave; if a ton of dirt fell down, and you were any way in or around, or near the mine, you could hear it. I could hear it from the position I was.

“Q. Please state for our benefit when the ore, or rock, or whatever the material was that fell down in this cave, and struck the floor below, what happened?”

“A. Well, it fell down, and the largest lumps of course just rolled over.

“Q. Where did they roll to?”

“A. Well, the large lump that caught Mr. Cunningham rolled over and pinned him up against the pillar—caught his leg and pinned him up against the pillar.

“Q. Did you see that large lump? A. Yes, sir.

“Q. And directing your attention to the dotted line extending from the switch in a northeasterly direction what does that dotted line represent?”

“A. I do not know.”

“Q. Did you ever remove that large lump?”

“A. The next morning.

“Q. Do you know what the effect would have been if that lump of rock had struck a man who was directly beneath it?”

“A. Broke every bone in his body.”

[Testimony of Edmund Grimani, for Defendant.]

Mr. EDMUND GRIMANI, called as a witness on behalf of the defendant, after being sworn, testified as follows:

Direct Examination by Mr. JARMAN.

My business is a miner; have been in that business about twelve years, I started in 1902. At the present time I am employed at the Keane Wonder Mine, as foreman. I succeeded Mr. Wren. I have worked at the Keane Wonder Mine three years and have been foreman about one year. The [145] first time I started in a mine was in the Langlotte in South Africa. I started in to learn a machine in that mine. I worked three months as an apprentice on the machine, then went to the Mine Inspector's, and passed an examination to get a certificate to run a machine. I got the certificate. I worked at that same mine about one year. After that I worked in several mines along that Rand, along that same district. Since I started mining and obtained a certificate I have been in the same business, machine-man, ever since. I have also worked in the L. S. & P. mine at Bisbee, Arizona. I worked there eighteen months as machine-man. After leaving that mine I went to Tonopah and worked in the Belmont Mine, as machine-man. I worked there thirty-five shifts. Then I went prospecting and after that came to the Keane Wonder Mine. I have remained there ever since and now in the employ of the company. On the day the plaintiff Mr. Cunningham was injured, I was not at the Keane Wonder Mine. I

(Testimony of Edmund Grimani.)

know Mr. Cunningham. At that time I was on a vacation. I quit on November 4th, on which day I was running a machine in said mine. I had been running a machine continuously in that mine eleven months prior to that time.

Q. I will ask you, Mr. Grimani, to step down and examine this map "A," which purports to be a floor plan of the Keane Wonder Mine as it was on or about the 9th day of December, 1911.

Mr. JARMAN.—Why, certainly.

Q. Were you familiar with those conditions at that time, November 14th?

A. With the place that I worked in, yes.

The place that I worked, or quit working on November 14th, the nearest I could come to it, I think I had started to cut that pillar (indicates). The pillar marked "23." I started to cut that pillar—this one here (indicates). The pillar marked "NP" was already cut. There was a track between the pillar "NP" and the place marked "23" at which I was at work at that time. I had been running a machine at this place (indicating on map); right there; that was when I quit, but I worked all through this country here, took out lots of this ground.

"Q. Who, if anybody that you know, worked a machine in the place between pillar 'NP' and the pillar marked '23'?

"A. Well, I could not say. I might have worked there myself, but I could not state whether I actually worked in that place. [146]

"Mr. MILLER.—I desire at this time to have the

(Testimony of Edmund Grimani.)

point where he says he last worked, marked.

“The WITNESS.—Marked ‘23’ pillar.”

“Mr. JARMAN.—Well, we will mark it ‘G.’ Indicating the end of pillar ‘23’ by the letter ‘G.’ (The point indicated by the witness is marked with the letter ‘G’ on map ‘A.’)”

I was absent from that mine on my vacation about four months. I returned to work March 16th.

Q. Upon your return to work, have you ever been in that mine at or about the place indicated on the map, near to the pillar which you have just testified to?

“The WITNESS.—You mean where I worked near where the accident occurred?

“Mr. JARMAN.—Yes, sir.

“A. Yes, sir, I did.

“Q. When was the last time you were in that mine? A. The day before I came up here.

“Q. And how long ago was that?

“A. On the 16th of this month.

“Q. That was the day before you left the mine to come here as a witness in this case? A. Yes, sir.

“Q. Did you ever see the place where the cave occurred, which resulted in the injury to the plaintiff in this action? A. Yes, sir.

“Q. Do you know where that place is in the mine?

“A. Yes, sir.

“Q. Will you point it out on this map to the jury?

“A. Right where that cross is (indicating on map ‘A’).

(Testimony of Edmund Grimani.)

“Q. That is the cross near the pillars ‘NP’ and ‘23’? A. Yes.

“Q. Now, how can you tell that was the place of your own knowledge?

“A. I went down and measured it all up the day before I came here, along with Mr. Wilson; that is, measured the distance between them pillars.”

I always studied the roof when I got to work.

“Q. I mean whether you had studied that particular point of this accident? A. Yes, sir.

“Q. Did you observe that some ore had fallen there from the roof?

“A. No indication to show whether any one had fallen; the roof at the present time is just a smooth body of schist.

“Q. Now, when you left there was the roof at that point a smooth body of schist? A. No, sir.

“Q. What was there? A. Ore.

“Q. What is that?

“A. Ore; we hadn’t advanced to that point at that time, when I left.

“Q. What do you mean when you say you had not advanced to that point?

“A. Well, the face had not advanced that far; it was virgin ground at that time; we were within; must have been about [147] eight or ten feet, I should say, of that place.”

The ground I was working on at that time I quit was hard quartz. It was pretty hard-breaking ground, in fact it was ground that you could not make no headway without a machine; you had to get

(Testimony of Edmund Grimani.)

a machine to work; pretty tough breaking ground; you had to have holes pretty close together, that is, about eighteen inches, from that to two feet, in order to get a good show to break. I operated a piston machine. I took out the lower part, about six and a half to seven feet.

“Q. Did you work on the ore above what you took out? A. Not on the ore above, no, sir.

“Q. How far would you continue working in the ore body with your piston machine with the ore remaining over your head?

“A. Oh, there was no specified distance.

“Q. Did you ever continue your work with that ore overhead?

“A. Well, we used sometimes a Waugh machine, it would come along, might be twenty or fifty feet farther away, but we were working always at the ore above our head.

“Q. But the piston man always had this ore about his head? A. Yes.

“Q. Now, why didn't that ore fall down of its own weight?

“A. Well, it was pretty solid ground, there was no show for it to fall down.

“Q. Could you bar it down? A. No, sir.

“Q. How did the Keane Wonder Mining Company get that ore down? A. By a Waugh machine.

“Q. By a Waugh machine, you mean by drilling holes in it? A. Drilling holes in it.

“Q. And loading the holes? A. Yes, sir.

“Q. And shooting it down? A. Yes, sir.”

(Testimony of Edmund Grimani.)

There was pillars and stulls in there, that is all there was, about the place pointed out to me on this map. I know where the chute is. It is where they dump the ore on the car-track, which you pointed out to me on the map.

“Q. Now, can you state to the jury whether or not there are any pillars or stulls between that chute and the pillar designated ‘NP’ on this map?

“The COURT.—Do you propose to prove the condition on November 14th?

“Mr. JARMAN.—Yes, sir; to show they were there then, and are there now.

“The COURT.—The same ones?

“Mr. JARMAN.—The same ones.

“The COURT.—Very well, go on. (By direction the reporter reads the question.)

“A. There are some there at the present day—stulls and pillars.” [148] These pillars here are in the mine at the present time (indicates on map).

The COURT.—On the 14th of November, when you were there, the points indicated to be pillars, were solid ground?

“A. Not down here (indicates on map); these were taken out.

“Q. How did those pillars get there, then?

“A. They were cut there.

“Q. Was there any solid ground when you were there on the 14th of November?

“A. Along up here (indicates); I had worked this ground out myself on the machine.

“Q. Did you leave those pillars there when you

(Testimony of Edmund Grimani.)

worked it out? A. Yes, sir.

“Q. That is what you wanted to say, then.”

The height or distance between the foot-wall and the hanging-wall at about the places indicated on that map by a cross, near the pillars marked “NP” and “23” was about fourteen feet. The average height between the hanging-wall and the foot-wall for some distance around that place was about fourteen feet.

Q. For what distance around that particular point which is indicated on the map will the distance between those walls be about fourteen feet?

A. Oh, within a hundred foot circle.

Within a hundred foot circle around that point there, the distance between the two walls does not exceed fourteen feet. When I go on shift the first thing I do is to have a look at the place I am going to work in.

“A. When I first go on shift, I hunt around, and look overhead, and in fact, I look all around to see how the ground is; then I get in and rig up my machine and drill for the rest of the shift, up till about an hour before quitting time, and then shoot.”

If there is anything on the hanging, or near about there, I pull it down. I am referring to the place I am working in. I do not go to any other place in that mine and pull down any stuff or bar it down. That is done by anyone that is working in the place—each man generally looks after himself; that is, as to the particular place.

“Q. If there is any barring down to be done in

(Testimony of Edmund Grimani.)

any other part of the mine, overhead, where a machine-man is not working, who, if anybody, bars that down?

“A. Any man who goes in there to work.

“Q. Well, suppose there is no machine-man working there, who would do the work?

“A. It don't have to be a machine-man; any person who goes into that place to work, he [149] naturally would look around to see whether there was any dangerous ground, and pull it down.

“Q. Who else besides the machine-men were employed in that mine during the time you were employed there? A. Muckers.

“Q. And what work did the muckers do in the mine? A. Well, they muck the ore out.

“Q. Do they do anything else? A. Yes.

“Q. What?

“A. If there was any track, or stulls, or such things as that to do, they did it.

“Q. Who put up the stulls in that mine?

“A. The muckers.

“Q. Did you ever see any muckers putting up stulls in that mine? A. Yes, sir.”

They get the stulls on the outside of the mine; they was sent up from the mine. Sometimes they were kept out by the blacksmith-shop, and sometimes down below by the tramway, where they came up. I could not say how many stulls I have seen there; there is generally a pile of them out there.

“Q. Do you know what they were intended to be used for? A. Yes.

(Testimony of Edmund Grimani.)

“Q. What? A. To keep up bad ground.

“Q. To keep up bad ground? A. Yes.

“Q. What part, if any, had the muckers to do with keeping up bad ground?

“A. They put them stulls in; that is, if it is necessary for a stull.

“Q. If it was necessary? A. Yes.”

I would not have to prepare any particular space at all when I went on shift to go to work, just room enough to work. I would have to rig up my bar of my machine four feet from the face. I would operate in about five feet of the face, in width; that is, that would be about as much ground as I could drill in one shift. It took me about twenty minutes or half an hour to set up my machine and get to work when I went on shift.

Cross-examination by Mr. MILLER.

I do not know of my own personal knowledge where this cave took place on December 9th, 1911. I had not seen that ground at that particular place since Nov. 14th previous. I did not see it again until March 16th, 1912. The only way I know where this cave took place is because somebody pointed it out. There is nothing on the hanging-wall to indicate where the cave came from. When I saw it in March it was a smooth hanging-wall. The last time I saw it, November 14th, previous to this cave there was ore there. Of my own personal knowledge I don't know anything was done in that [150] mine between November 14th and March 16th. When I set up my machine, the first thing when I went on

(Testimony of Edmund Grimani.)

shift I looked around to see the condition of the ground, then I took a bar or pick and barred or picked down the face, where I was going to drill against. I also picked it down overhead. That was my duty as a miner; then I made a place to set my machine. When I went on shift as a miner and machine-man in the Keane Wonder Mine in 1911, at the time specified, I sometimes went alone to my place of work to do this and sometimes had company. Sometimes I had another person working at the machine along with me in that one place; another machine-man; two machines working in one place. That was all the company or help I had in the matter. I went on shift in the Keane Wonder Mine in 1911, when I worked there, at half-past seven. I went into the tunnel entrance. I went off shift four-thirty. I was supposed to leave the mine and go through the tunnel at four-thirty.

[Testimony of E. W. Williams, for Defendant.]

Mr. E. W. WILLIAMS, called as a witness on behalf of defendant, after being sworn, testified as follows:

Direct Examination by Mr. JARMAN.

My name is E. W. Williams. I have followed mining mostly in the last twelve or fourteen years. I am in the employ of the Keane Wonder Mining Company and was in their employ on or about December 9th, 1911. I was at the mine the day that plaintiff was injured. I know the plaintiff, Mr. Cunningham. I know the place in that mine where the cave took place which resulted in the injury to plaintiff. I

(Testimony of E. W. Williams.)

am familiar with map "A" on the board to a certain extent. That is supposed to be the fourth level. The point where the cave took place on December 9th, 1911, was here (indicates on map). At the point indicated by a cross, near the pillars "23" and "NP." I went into the mine the next morning after the caving, the morning of the 10th, about 7:30. Mr. Roper and several more men went with me. After we got into the mine he showed us first where this cave took place. I found that the mixture of the hanging-wall, there was a little ore in it, not much,—had caved down and rolled over between these two piers, on both the switch and the track. There was about four or five tons, I should judge. There was one pillar on each side of the switch, and then there were stulls on the opposite side of the track, opposite the pillars, toward the chute. They were close to ten or twelve feet through, might have been a little longer [151] one way than the other.

"Q. Did you see any car used in the mining operations in that mine when you went there the next morning?

"A. I saw two cars.

"Q. Two cars? A. Yes.

"Q. Can you tell the jury where you found those cars?

"A. Yes, the cars were quite a little ways from this cave-in.

"Q. How far?

"A. Oh, any way from thirty to fifty feet.

"Q. Can you point out on the map where you saw

(Testimony of E. W. Williams.)

the cars, or found them? A. Yes.

“Q. Will you do so?”

One car was around the switch, what we call the switch, another one up the track, right straight up. The cars was in the opposite direction from the chute—from the cave, they were just about as far, or a little farther in the opposite direction from the cave as the chute was the other way.

“Q. In other words, you mean that the cave was between the chute and the cars?

“A. The cave was between the chute and the cars.

“Q. Now, did you examine those cars?

“A. Only one of them.

“Q. What one did you examine?

“A. The one in the switch.

“Q. Why did you examine that car?

“A. Because all of them went up and looked into it, most of the fellows—Mr. Roper and the rest of them.

“Q. What did you find from examination?

“A. Well, it was one-third to a half full of ore.

“Q. From one-third to a half full of ore?

“A. Yes.

“Q. Do you know of your knowledge who was working on that car on the day previous?”

No, I don't. I am familiar with the character of the ore in the Keane Wonder Mine, to a certain extent, as I worked in it. It is a very hard quartz, solid quartz, about as hard as you find anywhere.

Cross-examination by Mr. MILLER.

I was not in the mine on December 9th, 1911, nor

(Testimony of E. W. Williams.)

the day before. I had never been in there on the fourth level until the morning of the 10th, never been in the mine. I went in with Mr. Roper at his request; he told me to get a single jack. He requested me to go in and get a single jack-hammer; I was working on the outside. My business was not exactly to see where this cave took place, but he showed me while I was in there. I saw a schist and ore pile there, from five to six feet long, it looked like; maybe scattered a little farther than that, some of it, where it had rolled; some of it eight or nine feet. I should judge it was three and a half or four [152] feet wide, possibly eight or nine feet long. Some rocks there might have been twenty-four to thirty inches thick, that is above the floor of the stope; it wasn't in solid rock when I saw it at all. Some of it was twenty-four to thirty inches, some of it was down as low as a half inch. The tracks were not clear at that time. They were not completely covered, some ore on it and some not. I could tell from the look of the track that it had never been mucked away from the track. The switch ran right off of the main track. The switch track, the farthest point it had rock on it, to the corresponding point, straight across, from the main track was three or four feet. Right at that time there was nobody at work there that morning; it was just before going to work, just the time everybody was going on shift. I staid in there probably fifteen minutes. I noted particularly the direction of the tracks because I worked there afterwards. I was to go to work there that day, but he

(Testimony of E. W. Williams.)

wanted me to finish outside first. I am employed there now.

“Q. Did you see any machines in there that day?

“A. Yes, I did; I saw one machine that had not been set up yet, and one machine that the machine wasn’t up, but the bar was.”

Q. As a matter of fact, didn’t this track “W” extend farther to where it is marked, and the pillar “23,” up to where the car is marked?

A. Up in that direction, it did.

Q. Where did you see the car you speak about looking into, and seeing ore in it?

A. We went around between those two pillars, on around past them.

I saw the other car back on the main track, I should judge fifty or sixty feet. It was pretty near north from the cave; not toward the chute, but the other way.

“The COURT.—Q. Mr. Williams, when you examined that pile of debris at the place where the accident is said to have occurred on the morning of the 10th, did you examine it with any care?

“A. Yes, I did, because in a case like that anybody would naturally do it.

“Q. Did you observe whether there was anything in there except schist and ore?

“A. I didn’t see anything there but that schist and ore.

“Q. Did you see any tools there?

“A. No, sir, I did not.

“Q. No car there?

(Testimony of E. W. Williams.)

“A. Not right at that spot, no, sir. [153]

“Q. If there had been any shovel there, would you have seen it?

“A. I think I would if there had been any there.”

None of that pile of muck that had caved from the hanging-wall had been moved when I saw it, that I know of, and none was moved while I was there.

The COURT.—It didn't appear—any of it—to have been moved, did it?

A. No, sir, it didn't appear any of it to have been moved. I am pretty certain of that.

“Mr. JARMAN.—The defendant will rest.”

[Testimony of James Cunningham, for Plaintiff (in Rebuttal).]

Mr. JAMES CUNNINGHAM, called in rebuttal, testified as follows:

“Mr. MILLER.—Q. Mr. Cunningham, I desire you to examine this map, Defendant's Exhibit ‘A,’ and I call your attention to the track marked ‘Car-track,’ running from the chute into the stope; track marked ‘switch,’ and the track marked ‘W,’ and ask you to state whether or not that represents exactly the condition and place of that track on the 9th day of December, 1911.

“A. It does not represent it.

“Q. It does not represent it? A. No.

“Q. Will you state what change could be made in the map where it is marked ‘Switch,’ that part of the track, to make it represent the actual condition on the 9th of December, 1911?

(Testimony of James Cunningham.)

“A. Well, this main track should go up here.
(Indicates.)

“Q. Should go up there.

“A. And this is the switch marked off here, ain’t it?

“Q. Yes.

“A. And them pillars, I don’t understand them—that ain’t the way it looked at that time.

“Mr. MILLER.—Q. At that distance from the switch itself, was it on the 9th of December, 1911, to the place where the car was on the main track, if you know?

“A. Well, the car was on the switch.

“Q. Well, state whether or not there was a car on the main track that day, not on the switch, on the main track.

“A. There was several tracks; what one do you refer to as being the main track?

“Q. The track that you just said should be extended up to the face of that ore?

“A. No, there was no car.

“Q. Is there any other track at that part of the mine than what is represented on the map, now marked Defendant’s Exhibit ‘A’?

“A. In that part of the mine?

“Q. Yes. A. Yes.

“Q. You stated, I think, in your direct examination that there were three machines; state whether or not the muck from the different parts of [154] the face, was loaded or carred out upon one track or two tracks, or three tracks, if you know.

(Testimony of James Cunningham.)

“A. On two tracks.

“Q. Two tracks? A. Two tracks.

“Mr. MOREHOUSE.—I understand that to mean they were carrying out the muck on the two tracks.

“Mr. MILLER.—Yes.”

During the time I was working in the Keane Wonder Mine I never put up or assisted in putting up a stull. I was never instructed or requested by Mr. Roper, or any other person whatsoever in authority, to put up a stull or assist in putting it up.

During the time I worked there as a mucker, I was never informed by Mr. Roper, by John Keith, or by any person in authority, that there were stulls in the mine, or outside the mine and that I was to use them in case I saw a dangerous place in the roof.

“Mr. MILLER.—Plaintiff rests, if your Honor please.”

Wednesday, November 26th, 1913.

Court convened 9 A. M. (All parties present.)

“Mr. JARMAN.—After hearing all the evidence in the case, and after a full and further consideration of the law involved, we desire to renew our motion previously made, upon the second and fourth grounds thereof, which were stated to your Honor the other day, and upon those grounds alone is the motion made at this time. I have the reporter's transcript of the motion made the other day, showing the second and fourth grounds, and counsel being familiar with it, it may be considered that the motion is made upon those grounds, without stating them if that is satisfactory?

“Mr. MILLER.—It may be made upon those grounds.

“The COURT.—It will be the same ruling and the same exception.”

[Instructions of Court to Jury.]

“The COURT.—Gentlemen, you will now listen to the instructions. The defendant and the plaintiff here are master and servant. From this relation spring certain reciprocal and mutual duties. We are concerned here only with those duties which are alleged to have been violated. The plaintiff in his complaint is expected to state his cause of action fully. He has alleged that he was injured while at work in the Keane Wonder Mine in [155] the line of his duties; that the injury was caused by the caving of a slab of ore and rock from the roof of the stope in which he was at work, and that this was all the result of the defendant’s failure to perform the duty which it owed to him.

“Plaintiff avers that the defendant failed to furnish him a reasonably safe place to work, and safe appliances, ways and tools, in this, that it negligently failed to properly support the roof of the stope; that it negligently failed to pick and bar down the loose rock and ore from the roof of the stope, and that it neglected and failed to properly inspect and examine the roof of the stope. This is the negligence which is specifically charged against the defendant.

“If the plaintiff fails to prove the negligence so charged, he cannot recover. He must recover on the case as he has laid it. He cannot recover for an act of negligence which he has not charged. Conse-

(Testimony of James Cunningham.)

“A. On two tracks.

“Q. Two tracks? A. Two tracks.

“Mr. MOREHOUSE.—I understand that to mean they were carrying out the muck on the two tracks.

“Mr. MILLER.—Yes.”

During the time I was working in the Keane Wonder Mine I never put up or assisted in putting up a stull. I was never instructed or requested by Mr. Roper, or any other person whatsoever in authority, to put up a stull or assist in putting it up.

During the time I worked there as a mucker, I was never informed by Mr. Roper, by John Keith, or by any person in authority, that there were stulls in the mine, or outside the mine and that I was to use them in case I saw a dangerous place in the roof.

“Mr. MILLER.—Plaintiff rests, if your Honor please.”

Wednesday, November 26th, 1913.

Court convened 9 A. M. (All parties present.)

“Mr. JARMAN.—After hearing all the evidence in the case, and after a full and further consideration of the law involved, we desire to renew our motion previously made, upon the second and fourth grounds thereof, which were stated to your Honor the other day, and upon those grounds alone is the motion made at this time. I have the reporter's transcript of the motion made the other day, showing the second and fourth grounds, and counsel being familiar with it, it may be considered that the motion is made upon those grounds, without stating them if that is satisfactory?

“Mr. MILLER.—It may be made upon those grounds.

“The COURT.—It will be the same ruling and the same exception.”

[Instructions of Court to Jury.]

“The COURT.—Gentlemen, you will now listen to the instructions. The defendant and the plaintiff here are master and servant. From this relation spring certain reciprocal and mutual duties. We are concerned here only with those duties which are alleged to have been violated. The plaintiff in his complaint is expected to state his cause of action fully. He has alleged that he was injured while at work in the Keane Wonder Mine in [155] the line of his duties; that the injury was caused by the caving of a slab of ore and rock from the roof of the stope in which he was at work, and that this was all the result of the defendant’s failure to perform the duty which it owed to him.

“Plaintiff avers that the defendant failed to furnish him a reasonably safe place to work, and safe appliances, ways and tools, in this, that it negligently failed to properly support the roof of the stope; that it negligently failed to pick and bar down the loose rock and ore from the roof of the stope, and that it neglected and failed to properly inspect and examine the roof of the stope. This is the negligence which is specifically charged against the defendant.

“If the plaintiff fails to prove the negligence so charged, he cannot recover. He must recover on the case as he has laid it. He cannot recover for an act of negligence which he has not charged. Conse-

quently in your deliberations, you will consider the bearing of the testimony on these questions. Did the defendant fail to exercise reasonable care—that is, the care which an ordinarily prudent man engaged in the same business would have exercised under the conditions which prevailed at the time of the accident in the Keane Wonder Mine; to support the roof of the stope, to inspect and examine the roof, and to pick and bar down the loose rock and ore.

“You cannot infer from the fact that a man has been injured that someone must pay for it. It is not the law that every injury must be compensated. In every case of this kind the inquiry must be as to whether the injury was the direct result of the fault, neglect, or carelessness of someone who ought to be held responsible. This is the important question before you. You must determine it regardless of any sympathy which may be excited by the condition of the plaintiff, or by the fact that the defendant is a corporation. You are to determine the issues here presented without prejudice or bias, as honest, impartial men, sworn to try the case according to the law and the evidence, and a true verdict render.

“Neither from the mere falling of the rock, standing alone, can you find the defendant is liable. The defendant is not liable unless it was negligent in the manner alleged in the complaint, and such negligence must be shown by [156] the testimony to have been the direct and proximate cause of the injury.

“Negligence consists in the omission to do something which a reasonably prudent man, guided by those considerations which ordinarily regulate the

conduct of human affairs, would do ; or in doing something which an ordinarily prudent man would not do under the circumstances.

“The question of negligence is to be determined in all cases by reference to the situation and knowledge of the parties, and all of the attendant conditions which are disclosed in the testimony.

“In this case the defendant is guilty of such negligence if it is shown by a preponderance of the evidence that it failed to exercise that degree of care in the inspection and examination, and the frequent inspection and examination, of the roof of the stope ; in the picking and barring down of loose rock and ore therefrom ; and in the placing of proper stulls and supports which an ordinarily prudent miner would have exercised under the circumstances and conditions which prevailed in the Keane Wonder Mine at that time ; and for this reason and in these respects, failed to furnish plaintiff with a reasonably safe place within which to work.

“A large number of requests for instructions have been presented to me. I have selected those which seem to me to have a bearing, and others, which I will not read, will be given in substance in the general instructions. I do this largely because I do not wish to take up too much time, and, while they may occupy some time in the reading, I think owing to the importance of the case, you ought to be fully instructed, even though there will be some repetition, and I hope you will bear with me.

“The duty of inspection is affirmative, and it must be continuously fulfilled and positively performed.

In ascertaining whether this has been done or not, the character of the business should be considered; that is, you should consider what, under those conditions, the ordinarily prudent miner, in such a mine at that time, would have done.

“The Keane Wonder Mining Company is not a guarantor of the safety of its mine as a place for its employees to work while engaged in the line of their duty or in the course of their employment; that is, it is not bound to secure the absolute safety of its employees while so engaged in the mine, [157] but it is only bound to exercise such ordinary and reasonable care for the safety of its employees while so engaged, or in the mine, as an ordinarily prudent man engaged in the same business would use under like circumstances.

“That instruction I have already given in substance.

“If you find from the evidence that the proof establishes nothing more than a mere accident which resulted in an injury to the plaintiff, then I instruct you that the plaintiff cannot recover, and your verdict should be for the defendant.

“In an action by an employee against his employer, I instruct you also that in the absence of evidence to the contrary, it will be presumed that the methods of work adopted by the latter are proper and sufficient. If you find that the plaintiff has not proven and established to your satisfaction by a preponderance of the evidence that the methods of operation adopted and used by the defendant at its mine were insufficient, or were improper, then you cannot find

in this respect, that the defendant was negligent. The effect of this is simply in line with the general instruction that the burden rests upon the plaintiff to establish his case by a preponderance of the evidence. There is no presumption that the defendant is guilty of negligence, but it must be established by the proof that its methods were insufficient or improper.

“You are further instructed that it was the duty of the defendant here to provide a reasonably safe place for plaintiff to work during the time he was a hired workman in the employ of the defendant, and while he was engaged in the line of his employment.

“An employer will generally discharge himself from the imputation of want of ordinary and reasonable care, by adopting and using such methods of work as are common among miners under like circumstances, and he will not be liable in damages for an injury to an employee caused by the falling of rock or ore from the hanging-wall or roof where he has made ordinary and reasonable inspection and tests—such tests, and such frequent tests, as would be made by prudent miners under like conditions. If after an inspection, the work presents every appearance of being reasonably sound and safe, and its defective appearance is liable to mislead or escape the careful observer, this should be taken into consideration, and in weighing the testimony, you [158] may consider the fact, if it be a fact, that like conditions have long existed in the mine where the accident occurred, and that no accident had theretofore taken place, or any caving occurred. In

order, therefore, to charge the defendant with negligence in this case because of the falling of rock or other materials from the roof or hanging-wall, plaintiff must prove by a preponderance of the evidence that the defendant had previous knowledge of such defective or dangerous condition of the roof or hanging-wall, or that, by the exercise of reasonable care and inspection, the defendant could have discovered such a defective or dangerous condition; and if you find that the defendant did exercise ordinary and reasonable care, such as is required under these circumstances, then it would be excused.

“You are instructed that the plaintiff while in the employ of the defendant, and engaged in the line of his employment, had a right to take it for granted that the defendant had performed its duty in furnishing a safe place for work, until he was warned or notified of a danger arising from negligence, or until the danger became so obvious that a reasonably prudent workman under the circumstances, would observe it.

“The care which is required of a mining company and of a master under such circumstances, depends upon the conditions; the more dangerous the conditions, the greater the degree of care required. Ordinary care under some circumstances, would not be the ordinary care under more dangerous conditions.

“The injury complained of occurred in the State of California, consequently we are governed by the law of that commonwealth in the particulars which I shall indicate. Formerly in California it was the law that the employee assumes the ordinary risks of

his employment, and that he could not recover if he were himself guilty of contributory negligence, which negligence directly caused or contributed to cause the injury, or if the injury was the result of the negligence of a fellow-servant. This has been changed by the statute of that State. Now, in any action to recover damages for personal injury sustained in California by an employee while engaged in the line of his duty or in the course of his employment, on the ground of the want of ordinary or reasonable care of the employer, or of any officer, agent, or [159] servant of the employer, it shall not be a defense that the employee, either expressly or impliedly, assumed the risk or hazard complained of, or that the injury was caused in whole or in part by the want of ordinary or reasonable care of a fellow-servant. Furthermore, the fact that such employee himself may have been guilty of contributory negligence, shall not bar a recovery therein, where his contributory negligence was slight and that of the employer was gross in comparison, but the damages may be diminished by the jury in proportion to the amount of negligence attributable to such employee.

“If you find from the evidence that said injury to plaintiff resulted from contributory negligence on the part of the plaintiff, and that no negligence is proven or established on the part of the defendant, or that the negligence on the part of the defendant, if any, is not gross in comparison with the negligence established on the part of the plaintiff, then I instruct you that if the plaintiff is guilty of contributory neg-

ligence which is more than slight negligence, he cannot recover.

“If you find from the evidence that the plaintiff is entitled to recover, as alleged in his complaint, then in estimating the plaintiff’s damages, you may take into consideration his health and physical condition prior to the injury, also his health and physical condition since then, if you believe from the evidence that his health and physical condition since then is impaired as the result of such injury; and you may also consider whether or not he has been permanently injured, and to what extent; and also to what extent, if any, he may have endured physical suffering as the natural and inevitable result of such injury; and also any necessary expense he may have been put to in and about caring for himself, and curing himself, and the value of any time you may believe from the evidence he has lost on account of such injury; and you may consider what, if any, effect, such injuries may have upon him in the future in respect to pain and suffering, or in respect to his power to earn money by his labor; and you should allow him as damages such sum as, in the exercise of sound discretion, you may believe from all the facts and circumstances in evidence, will be a fair and just compensation to him for the injury, but not exceeding in the whole the sum of \$50,000. [160]

“In this case the plaintiff asks both actual and exemplary damages, aggregating the sum of \$50,000. There are two classes of damages which are awarded by juries in particular cases; there are actual damages, which are supposed to be exactly the equivalent

of the injury suffered; and there are exemplary damages and punitive damages, which are sometimes denominated smart-money. These are inflicted as punishment, and they are only proper where the injury or the negligence has been wanton or wilful, or has been inflicted under such conditions as to indicate a wicked spirit, or reckless disregard of the rights and of the safety of others. You can only award in this case actual damages. There is no evidence, to my mind, sufficient to warrant me in submitting to you the question of punitive damages, and therefore you are instructed that you cannot award such damages.

“If you find that the plaintiff is entitled to a verdict, you are not permitted to fix the amount by lot, by chance, or by averages. It is improper for one or more members of the jury to separately fix the damages, add these together, and divide by any number, agreeing beforehand that the result so obtained shall be the verdict; or for each member of the jury to set down a figure he thinks fair, and add these separate amounts, and divide the aggregate by twelve, agreeing beforehand that such a result shall be the verdict.

“I further instruct that the employer is required to furnish his employees a reasonable safe place to work, yet this duty of the employer is limited and confined to the premises where the employee is required to be in the line of his duty and in the course of his employment; this duty on the part of the employer does not extend to the protection of the employee outside of those places where he works, or

where he is directed and required to be in the line of his duty and in the course of his employment; and if plaintiff was not at the time of the accident at the place where he was directed and required to be, and where he should have been in the discharge of his duty, but of his own volition was at some other place in the mine to suit his own convenience, or for his own purpose, then I instruct you that the plaintiff himself would be guilty of negligence.

“You are the exclusive judges of the facts, of the credibility of the witnesses, and of the weight which is to be given to each statement made by [161] each witness. Counsel may declare what is proven, and the Court may express his views as to the facts; you, however, are to listen to such utterances, and give them such consideration, and such consideration only, as in your judgment you deem proper and reasonable as intelligent, honest men.

“As to the law, the rule is different. You are to follow the instructions of the Court. If the Court errs in its statement of legal principles, it is the error of the Court, for which the Court alone is responsible, and not the jury.

“It is hardly necessary for me to remind you that you are to consider only those facts which are disclosed by the testimony here admitted. You cannot go outside of or beyond the testimony. You are not to consider any testimony which has been stricken from the record.

“The plaintiff is not entitled to a verdict on any ground of negligence not set up in his complaint, neither is he entitled to recover in this action unless

you believe from a preponderance of the evidence that the injury was the natural and proximate result of some wrongful act, neglect or default of the defendant.

“By a preponderance of evidence is meant that evidence which after a consideration of all the evidence is entitled to the greater weight; it is such evidence as when compared with that opposed to it, has the more convincing force. The burden of proving his case by a preponderance of the evidence rests on the plaintiff. As I have already intimated, the defendant cannot be charged with a responsibility for the injury to the plaintiff, unless the injury was the direct and proximate consequence and result of the negligence and default of the defendant. A proximate cause of an event is defined as that which in the natural and continuous sequence, unbroken by any new independent cause, produced that event, and without which the event could not have occurred.

“A witness is entitled to the greatest weight, everything else being considered, who has the best opportunity to know and the highest degree of intelligence in seeing, understanding and weighing whatever appears before him in relation to the subject on which he is being examined. A witness is presumed to speak the truth; this presumption, however, may be repelled by [162] the manner in which he testifies, by his demeanor on the witness-stand, by the character of his testimony, by his motives, or by contradictory evidence or by his interest in the outcome of the case.

“In judging the credibility of the respective wit-

nesses in this case, if there is any conflict, you may believe the whole or any part of the evidence of any witness, and if you believe that a witness has testified falsely, and has done so knowingly and willingly, as to any material matter, you may disregard the whole or any part of his testimony as may be dictated by your best judgment, save where it is corroborated by other credible testimony.

“In this connection you must remember that your power and duty to judge of the effect of the evidence is not an arbitrary one, it must always be exercised with legal discretion, and in subordination to the rules of evidence.

“It takes twelve of your number to find a verdict. The clerk has prepared two forms of verdict, and when you have retired to your jury-room, you will elect a foreman; when you have agreed upon your verdict, you will notify the marshal, and you will be brought into Court.

“I will now leave the case with you, gentlemen, and I wish to say that I do it with the utmost confidence. You have listened to this evidence very patiently and very carefully. The hearing of the case has taken considerable time. You are to remember that you are here simply to find the truth, and to do that which is just and right between these two parties. You are not to be swayed by sympathy; you are not to decide against one party because it is a corporation, or in favor of the other party because he is a laboring man. You are not to be influenced by the condition, the wealth or poverty of either party; you are simply to give a verdict, just and fair, which your own con-

science will approve, and to do that which is right and just between man and man. Are there any suggestions that you wish to make, gentlemen?

“Mr. MILLER.—In that respect, if your Honor please, I have one suggestion, not as a criticism of the Court’s language, but in the instruction concerning the measure of damages.”

“The COURT.—I will instruct the jury further on that matter, although [163] I am satisfied that the jury understood. (Addressing jury.) The purpose of the Court was to confine you in finding your verdict to actual damages; that is, such damages as would fully compensate the plaintiff for his injury, and that is the limit to which you are permitted to go. You can go no further. The moment you attempt to give anything by way of punishment or smart-money, you are going further than the evidence justifies. If there were evidence here showing that the injury was wanton, or that there was a reckless disregard of the plaintiff’s rights, and of the safety of the miners in the mine, then it would be the duty of the Court to advise you of that fact, and instruct you further as to the matter; but I simply take the question of exemplary or punitive damages away from you, and tell you that you are to award such damages as fully compensate the plaintiff for his injury, provided, however, you find by a preponderance of the evidence, that the defendant was guilty of negligence, and that the negligence was the proximate cause, and direct cause, of the plaintiff’s injury, and that the plaintiff himself was not guilty of contributory negligence; that is, of negligence that was anything more

than slight negligence. If the plaintiff was guilty of slight negligence, which ministered and contributed to this injury, and the defendant was guilty of gross negligence in comparison with the plaintiff's negligence, then you will give a verdict for the plaintiff, but you should offset from it a reasonable amount which would be commensurate with his contributory negligence. If he is guilty of something more than slight negligence, he cannot recover. I think that is just what I intended to give before. You may take your exceptions now.

"Mr. MOREHOUSE.—I desire to except to that specific instruction of your Honor relating to the law of California, wherein your Honor has stated to the jury that the law of California was changed by statute in that State. The point which I desire to urge is that the law of California, as alleged in the complaint in this case, is insufficient to sustain or permit the prosecution of this action under that law, and if any law shall prevail, it has got to be the law of the forum, to wit; the law of the State of Nevada, as distinguished from the law of the *lex loci*, or place where the accident occurred.

"The COURT.—That is simply in line with the argument of the motion that was made? [164]

"Mr. MOREHOUSE.—Yes, that is in line with the argument on the motion.

"The COURT.—I am satisfied with that instruction. I think it is in line with the order I made overruling the motion.

"The COURT.—I will give this instruction as defendant has asked it. (Addressing the jury.) I

further instruct you that an employer is required to furnish his employee a reasonable safe place in which to work, yet this duty of the employer is limited and confined to the premises where the employee is required to be in the line of his duty and in the course of his employment; this duty on the part of the employer does not extend to the protection of the employee outside of those places where he is directed and required to be in the line of his duty and in the course of his employment. If plaintiff was not at the time of the accident at the place where he was directed and required to be, and where he should have been at work, but of his own volition was at some other place in the mine to suit his own convenience, and for his own purpose, and not for any purpose in line with his duty, then I instruct you that the defendant is not liable for the plaintiff's injuries."

"Mr. MOREHOUSE.—That will be satisfactory to us, if your Honor please."

"Mr. MILLER.—To which, if the Court please, the plaintiff desires to except on the grounds it is not a full and complete statement of the law; that it does not take into consideration the full and primary duty of the master to furnish a reasonably safe place to work; on the further ground that the instruction assumes some things not in evidence, as to the matter of suiting his own convenience, and matter of that kind."

"The COURT.—No, they must find that. If the jury finds that the plaintiff was not at the time of the accident at the place where he was directed and required to be, and where he should have been at work,

but if it finds that of his own volition he was at some other place in the mine, and he was there to suit his own convenience, or to suit his own purposes, then I instruct you that the defendant is not liable. The jury must find that before they can find the defendant not liable."

"Mr. MOREHOUSE.—Since the modification of this instruction to suit our contention, the only exception we have is to the instruction relating to [165] the law of California."

Thereupon the jury retired to consider of their verdict, and returned into Court with the following verdict, to wit:

"We, the jury in the above-entitled cause, find for the plaintiff, and assess the damages at \$12,500.00.

Dated November 26, 1913.

BURT DAKE,
Foreman."

That thereafter, within the time required by law, and, to wit, upon the 18th day of December, 1913, defendant Keane Wonder Mining Company duly served upon the plaintiff's attorneys, and filed in the above-entitled court, in the above-entitled matter, its petition for a new trial; that, at all times from and after said 18th day of December, 1913, up to and including the date of the filing of this Bill of Exceptions, to wit, March 14th, 1914, said last-mentioned petition for a new trial was and is now pending before said District Court.

That since the said verdict in favor of plaintiff as aforesaid said District Court, from time to time, by order duly made, has granted to said defendant ex-

tensions of time, to and including March 14th, 1914, in which to prepare, serve and file its Bill of Exceptions to be used upon motion for a new trial and upon any Writ of Error hereafter to be allowed, the said order being signed by said court and filed herein in the office of the clerk of said court.

The foregoing constitutes all of the proceedings had and all of the testimony offered and received on the trial of said cause.

And now, within the time required by law, and the rules of this court, said defendant Keane Wonder Mining Company proposes the foregoing as and for the Engrossed Bill of Exceptions as aforesaid and prays that the same may be settled and allowed as correct.

SWEENEY & MOREHOUSE,
B. M. AIKINS,
A. H. JARMAN,

Attorneys for said Defendant, Keane Wonder Mining Company, a Corporation.

GAVIN McNAB,
of Counsel. [166]

[Order Settling and Allowing Bill of Exceptions.]

The foregoing Engrossed Bill of Exceptions being now presented in due time and found to be correct, I do hereby certify that the said bill is a true Engrossed Bill of Exceptions, and that it contains all of the testimony offered and received, and a correct reference to all the Exhibits introduced, and true and correct photographic copies of same, and all of the proceedings had on the trial of said cause.

Dated, March 14, 1914.

E. S. FARRINGTON,
United States District Judge for the District of
Nevada.

[Indorsed]: No. 1576. United States District Court, District of Nevada. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, a Corporation, Defendant. Engrossed Bill of Exceptions to be Used by Defendant on Motion for New Trial, etc. Filed August 10, 1914. T. J. Edwards, Clerk. Gavin McNab, A. H. Jarman, Sweeney & Morehouse, Attorneys for Defendant.

**[Order Granting Defendant Ten Days' Additional
Time to File Record in Appellate Court.]**

U. S. District Court, District of Nevada.

No. 1576.

JAMES CUNNINGHAM,

vs.

KEANE WONDER MINING CO.

Good cause appearing therefor, it is ordered that the defendant have ten days' additional time within which to file in Appellate Court, the record on writ of error in this cause.

Sept. 19th, 1914.

E. S. FARRINGTON,
U. S. District Judge.

[Indorsed]: No. 1576. U. S. Dist. Court, Dist. Nevada. Jas. Cunningham v. Keane Wonder M. Co. Order Enlarging Time to File Record on Writ of

Error. Filed Septr. 19th, 1914. T. J. Edwards,
Clerk. [167]

**[Order Granting Defendant Thirty Days' Additional
Time to File Record in Appellate Court.]**

*In the District Court of the United States for the
District of Nevada.*

No. 1576.

JAMES CUNNINGHAM

vs.

KEANE WONDER MINING CO.

Good cause appearing therefor, it is ordered that
the defendant have thirty days' additional time with-
in which to file the record on writ of error in the
United States Circuit Court of Appeals.

August 21st, 1914.

E. S. FARRINGTON,
Judge.

[Indorsed]: No. 1576. U. S. Dist. Court, Dist.
Nevada. Jas. Cunningham, v. Keane Wonder M.
Co. Order Extending Time to File Record on Writ
of Error. Filed August 21st, 1914. T. J. Edwards,
Clerk.

**[Order Granting Defendant Ten Days' Additional
Time to File Record in Appellate Court.]**

*In the District Court of the United States, in and for
the District of Nevada.*

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY,

Defendant.

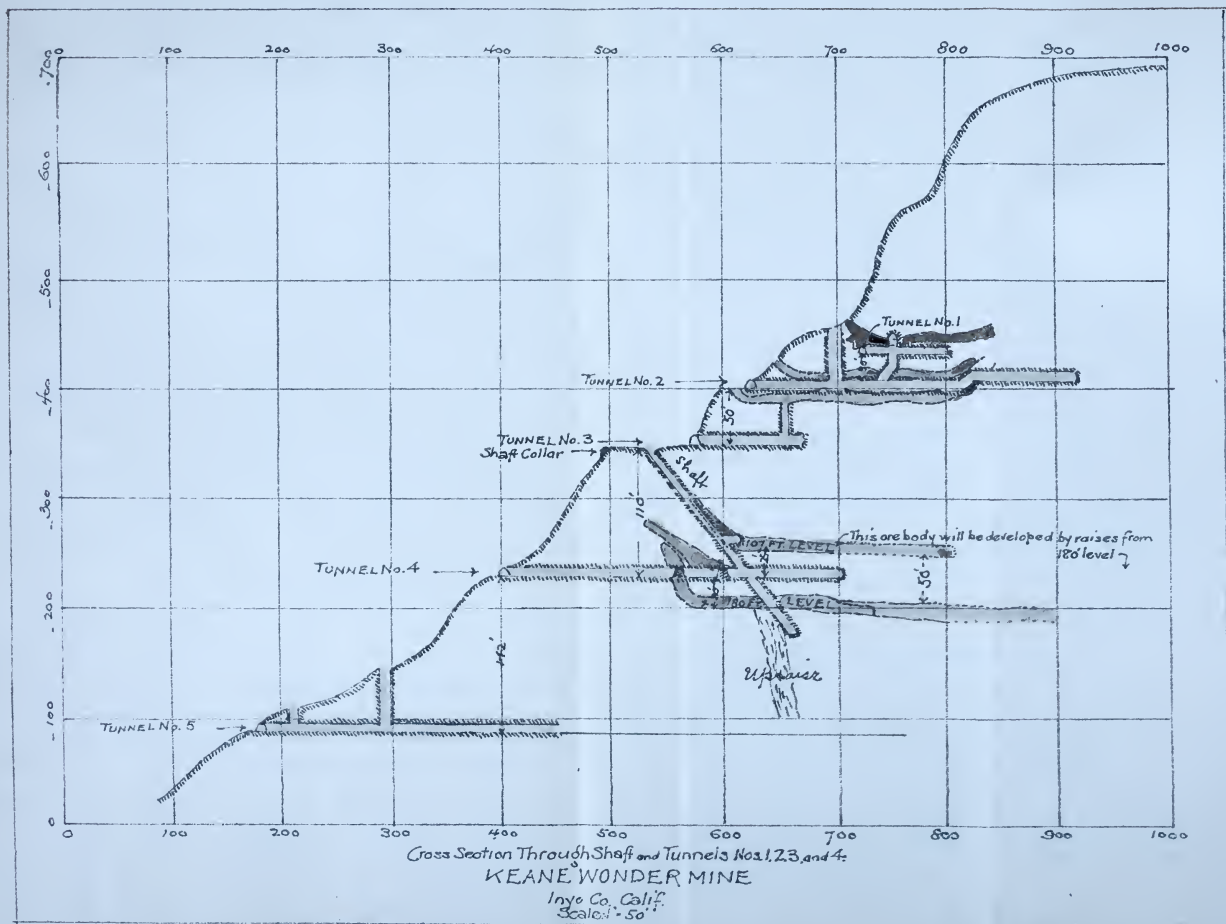
Good cause appearing, on motion of Sweeney & Morehouse, attorneys for the defendant in the above-entitled cause, the time within which to prepare and file its transcript on appeal on Writ of Error is hereby extended for a period of ten days.

Dated this 1st day of October, 1914.

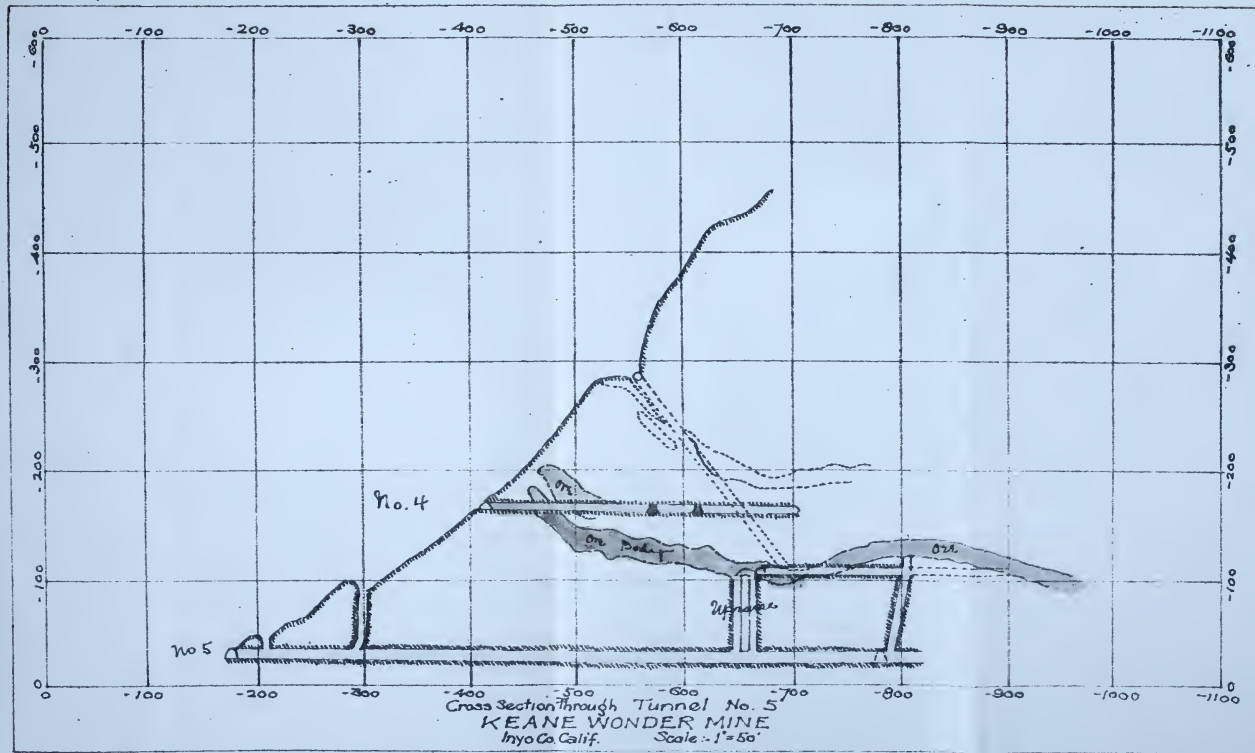
E. S. FARRINGTON,
United States District Judge.

[Indorsed]: No. 1576. In the District Court of the United States in and for the District of Nevada. James Cunningham, Plaintiff, vs. Keane Wonder Mining Company, Defendant. Order. Filed this 1st day of October, 1914. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Sweeney & Morehouse, Attorneys for Plaintiff. [168]

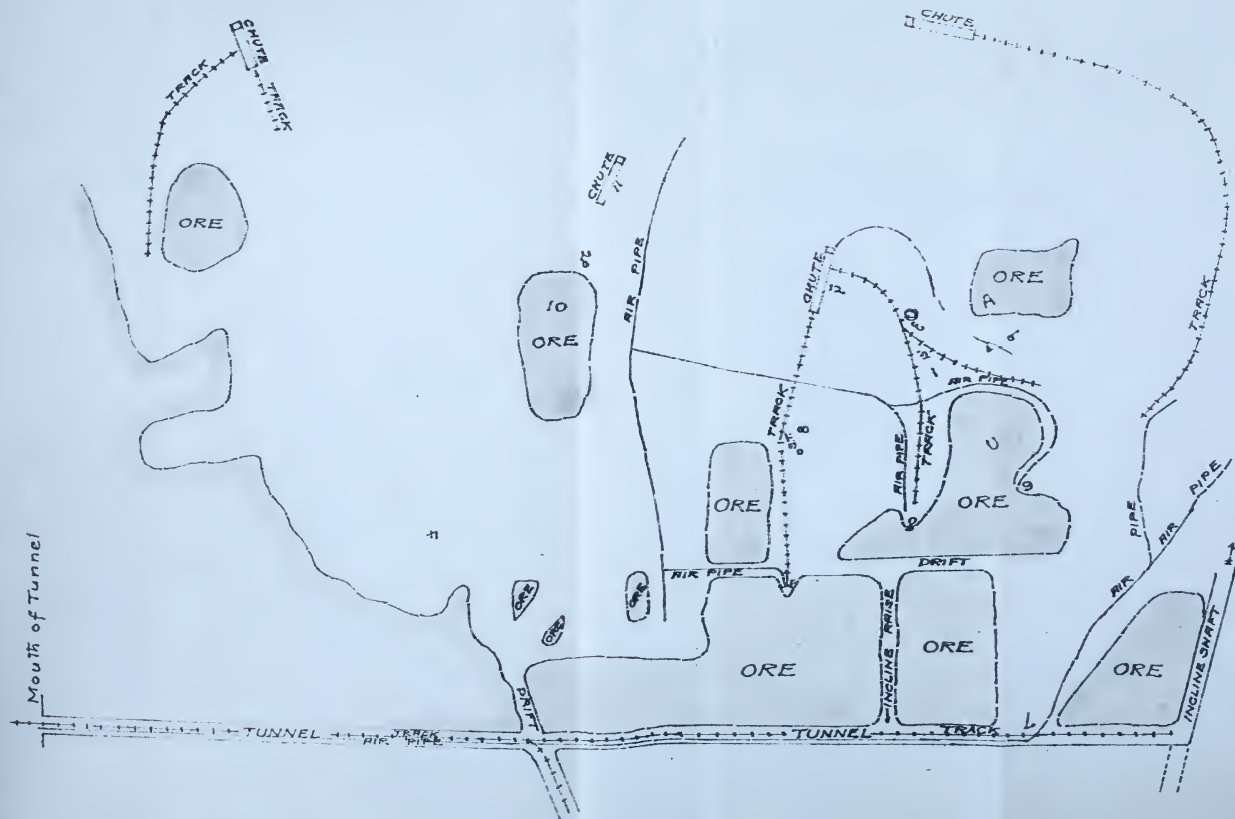
[Indorsed]: No. 1576, U.S. Dist. Court, Dist. Nevada,
 Cunningham v. Keane Wonder Mfg. Co. Defts. Exhibit C.
 Filed Novr. 24, 1913, T.J. Edwards, Clerk.



[Indorsed]: No. 1576, U.S. Dist. Court, Dist. Nevada.
Cunningham v. Keane Wonder Mfg. Co. Defts. Exhibit B.
Filed Novr. 24, 1913, T. J. Edwards, Clerk.



[Indorsed]: No. 1576, U.S. Dist. Court, Dist. Nevada.
Jas. Cunningham v. Keane Wonder M₃ Co. Plffs. Ex. No. 1.
Filed Novr. 20, 1913, T. J. Edwards, Clerk.



*In the District Court of the United States, in and for
the District of Nevada.*

No. 1576.

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY (a Cor-
poration),

Defendant.

Citation on Writ of Error [Original].

The President of the United States of America, to
James Cunningham, and to Dixon & Miller, His
Attorneys, Greeting:

YOU AND EACH OF YOU ARE HEREBY
cited and admonished to be, and appear, in the Cir-
cuit Court of Appeals for the Ninth Circuit, at the
City and County of San Francisco, State of Cali-
fornia, within thirty (30) days from and after the
date this citation bears, pursuant to a writ of error
filed in the office of the Clerk of the United States
District Court in and for the District of Nevada, in
the above-entitled cause, wherein James Cunning-
ham is plaintiff, and Keane Wonder Mining Com-
pany, a corporation, is defendant, to show cause, if
any there be, why the judgment made and rendered
in the above-entitled cause on the 14th day of March,
1914, against the said Keane Wonder Mining Com-
pany, a corporation, as defendant in said writ of
error mentioned, should not be corrected and re-

versed, and why [169] said justice should not be done to the parties in that behalf.

WITNESS, the Honorable E. S. FARRINGTON,
United States District Judge in and for the District
of Nevada, this 22 day of July, 1914.

E. S. FARRINGTON,
United States District Judge for the District of
Nevada. [170]

[Endorsed]: Original. No. 1576. United States
District Court, District of Nevada. James Cunningham,
Plaintiff, vs. Keane Wonder Mining Company,
Defendant. Citation on Writ of Error. Filed July
24th, 1914. T. J. Edwards, Clerk. [171]

**[Certificate of Clerk U. S. District Court to Trans-
script of Record.]**

*In the District Court of the United States for the
District of Nevada.*

No. 1576.

JAMES CUNNINGHAM,

Plaintiff,

vs.

KEANE WONDER MINING COMPANY, (a Cor-
poration),

Defendant.

I, T. J. Edwards, Clerk of the District Court
of the United States for the District of Nevada, do
hereby certify that the foregoing type-written pages,
numbered from 1 to 171, both inclusive, are a true
copy of the record, and of all the proceedings in the

cause therein entitled, and that the same together constitute the return to the annexed Writ of Error.

I further certify that the cost of this record is \$206.50, and that the same has been paid by the solicitors for defendant; and that copies of Exhibits No. 1, and of "A," "B" and "C" are attached hereto and made a part hereof.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, at Carson City, Nevada, this 6th day of October, 1914.

[Seal]

T. J. EDWARDS,
Clerk. [172]

[Endorsed]: No. 2495. United States Circuit Court of Appeals for the Ninth Circuit. Keane Wonder Mining Company, a Corporation, Plaintiff in Error, vs. James Cunningham, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the District of Nevada.

Filed October 10, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

JAMES CUNNINGHAM,

Plaintiff and Appellee,

vs.

KEANE WONDER MINING COMPANY, a Cor-
poration,

Defendant and Appellant.

**Order Enlarging Time to November 7th, 1914, to File
Record on Appeal.**

Good cause appearing, IT IS HEREBY ORDERED that the appellant have until the 7th day of November, 1914, within which to file the record on its appeal, and docket the case, and the appellant's time is hereby enlarged to that extent.

Dated October 21st, 1914.

WM. M. MORROW,

M. T. DOOLING,

Judges.

[Endorsed]: No. 2495. In the United States Circuit Court of Appeals for the Ninth Circuit. James Cunningham, Plaintiff and Appellee, vs. Keane Wonder Mining Company, a Corporation, Defendant and Appellant. Order Enlarging Time to November 7th, 1914, to File Record on Appeal. Filed Oct. 22, 1914. F. D. Monckton, Clerk.